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Blurred Lines or Bright Line? Addressing the Demand for Sex Trafficking Under California Law

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Blurred Lines or Bright Line?

Addressing the Demand for Sex Trafficking Under California Law

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I. INTRODUCTION

“Slavery is founded in the selfishness of man’s nature—opposition to it, is [in] his love of justice.”¹ Abraham Lincoln uttered these words in

1. Abraham Lincoln, Speech at Peoria, Illinois (Oct. 16, 1854), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 247, 271 (Roy P. Basler ed., 1953), available at <http://quod.lib.umich.edu/l/lincoln/247>

response to a long history of oppression and slavery in the United States.² It was not until the passage of the Thirteenth Amendment that slavery was legally abolished.³ However, almost 150 years later, slavery still exists in the United States as people continue to act on their selfish desires.⁴

Modern-day slavery is more commonly known as human trafficking.⁵ There are different types of human trafficking, but sex trafficking is the most prevalent.⁶ Sex trafficking occurs in virtually every country in the world, including the United States.⁷ Many Americans, however, are unaware of the harsh realities of sex trafficking: it exists in all fifty states and in the District of Columbia;⁸ it occurs in cities, suburbs, and rural areas;⁹ and it is prominent at events that draw large crowds, such as the Super Bowl.¹⁰ In addition to the many sex trafficking victims who are brought to the United States from other countries, it is often American men, women, and children who are enslaved.¹¹ Although runaways and the homeless are more likely to

ncoln/lincoln2/1:282?rgn=div1;view=fulltext.

2. *See id.*

3. U.S. CONST. amend. XIII, § 1.

4. *See infra* Part II.

5. *See, e.g.*, Office of Refugee Resettlement, *Fact Sheet: Sex Trafficking (English)*, U.S. DEP'T HEALTH & HUM. SERVS. (Aug. 2, 2012), <http://www.acf.hhs.gov/programs/orr/resource/fact-sheet-sex-trafficking-english> ("Sex trafficking is a modern-day form of slavery"); Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking*, FBI (Mar. 2011), <http://leb.fbi.gov/2011/march/human-sex-trafficking> [hereinafter *Human Sex Trafficking*] ("Human sex trafficking is the most common form of modern-day slavery.").

6. According to the United States Department of Justice, "About 8 in 10 of the suspected incidents of human trafficking [in the United States] were classified as sex trafficking, and about 1 in 10 incidents were classified as labor trafficking." Duren Banks & Tracey Kyckelhahn, *Characteristics of Suspected Human Trafficking Incidents, 2008–2010*, BUREAU JUST. STAT. (Apr. 28, 2011), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2372>.

7. *See* JOHNS HOPKINS UNIV., PROTECTION PROJECT, THE PROTECTION PROJECT REVIEW OF THE TRAFFICKING IN PERSONS REPORT JULY 2013, at 30–37 (2013) [hereinafter PROTECTION PROJECT REVIEW], available at <http://www.protectionproject.org/wp-content/uploads/2013/07/TPP-Review-of-TIP-Report-2013-Final.pdf>.

8. *The Victims*, NAT'L HUM. TRAFFICKING RESOURCE CENTER, <http://www.traffickingresourcecenter.org/what-human-trafficking/human-trafficking/victims> (last visited Oct. 19, 2014).

9. *Id.*

10. *See, e.g.*, Katie Zezima & Samantha Henry, *N.J. Works to Curb Sex Trafficking Before Super Bowl*, WASH. POST, Jan. 23, 2014, http://www.washingtonpost.com/national/nj-works-to-curb-sex-trafficking-before-super-bowl/2014/01/23/53208444-7703-11e3-8963-b4b654bcc9b2_story.html.

11. *Human Trafficking*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/overview> (last visited Oct. 19, 2014).

fall prey to sex trafficking, those from “good” homes are not immune.¹²

Like the Thirteenth Amendment, which made slavery punishable by law, additional statutes that protect victims and punish those involved in sex trafficking are needed in the United States to abolish modern-day slavery. This Comment focuses specifically on California’s laws relating to sex trafficking for two reasons. First, California’s laws fail to adequately address the demand for sex trafficking.¹³ Second, California has a unique relationship to pornography, which is intrinsically linked to sex trafficking.¹⁴ Throughout this Comment, victims are referred to as women and children, and buyers are referred to as men, because that is true in the majority of cases;¹⁵ nevertheless, men are also victims and women may also be buyers.¹⁶ Part II explains the definition and realities of sex trafficking with a special focus on buyers creating demand for sex trafficking. Part III discusses the current state of both the United States federal law and California state law by examining existing human trafficking statutes and applicable case law. Part IV analyzes the impact of California law on sex trafficking and the need for California to address demand. Part V suggests ways California can amend its human trafficking and pandering statutes to better address the demand for sex trafficking. Part VI concludes.

12. See *The Victims*, *supra* note 8; *Myths & Misconceptions*, NAT’L HUM. TRAFFICKING RESOURCE CENTER, <http://www.traffickingresourcecenter.org/what-human-trafficking/myths-misconceptions> (last visited Jan. 28, 2015) (explaining that victims “come from a range of income levels, and many may come from families with higher socioeconomic status”).

13. See *infra* Part III.B.1.

14. See *infra* Parts III.B.2–IV.A.

15. See, e.g., SHARED HOPE INT’L, DEMANDING JUSTICE PROJECT BENCHMARK ASSESSMENT REPORT 2013, at 22 (2013) [hereinafter DEMANDING JUSTICE], available at <http://sharedhope.org/wp-content/uploads/2013/11/Demanding-Justice-Project-Benchmark-Assessment-Report-2013.pdf> (citing a research study that found that 99% of buyers were males and approximately 78% of victims were female).

16. See, e.g., *id.* (citing a research study that found that 1% of buyers were female and 21% of victims were male); see also U.S. DEP’T OF STATE, MALE TRAFFICKING VICTIMS (2013), available at <http://www.state.gov/documents/organization/211836.pdf> (discussing male trafficking victims); Anna Smith, *It Happens to Boys, Too*, SHARED HOPE INT’L (Aug. 23, 2013), <http://sharedhope.org/2013/08/23/it-happens-to-boys-too/> (explaining that boys are also victims of domestic minor sex trafficking).

II. BACKGROUND

A. *Sex Trafficking*

Sex trafficking is a worldwide human rights issue that has received international attention and, in the United States, bipartisan condemnation.¹⁷ Addressing the United Nations in 2003, President George W. Bush stated,

There's a special evil in the abuse and exploitation of the most innocent and vulnerable. . . . Those who create these victims and profit from their suffering must be severely punished. Those who patronize this industry debase themselves and deepen the misery of others. And governments that tolerate this trade are tolerating a form of slavery.¹⁸

Likewise, in 2012, President Obama called sex trafficking “a debasement of our common humanity” that “tears at our social fabric” and that ought to concern every person, every community, every business, and every nation.¹⁹

In the United States, sex trafficking is defined by the Trafficking Victims Protection Act (TVPA)²⁰ as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”²¹ Notably, there is no requirement for travel or transportation of victims across state or national borders.²² A “severe form[] of trafficking in persons” occurs when “a commercial sex act is induced by

17. See, e.g., PROTECTION PROJECT REVIEW, *supra* note 7, at 66–67; Halimah Abdullah, *Sold into Sex Slavery: Lawmakers Work to End Underground Sex Trafficking*, CNN.COM (May 21, 2014), <http://www.cnn.com/2014/05/20/politics/sex-trafficking-bills/> (discussing bipartisan legislative bills aiming to curb sex trafficking in the United States).

18. George W. Bush, Address to the United Nations General Assembly (Sept. 23, 2003) (emphasis added), available at <http://www.un.org/webcast/ga/58/statements/usaeng030923.htm>.

19. Barack Obama, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative>.

20. The TVPA is codified in scattered sections of Titles 18 and 22 of the United States Code. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 [hereinafter TVPA].

21. 22 U.S.C. § 7102(10) (2012).

22. See *Myths & Misconceptions*, *supra* note 12 (noting that the crime of human trafficking does not require transportation).

force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.”²³ A “commercial sex act” is “any sex act, on account of which anything of value is given to or received by any person.”²⁴ These acts can include prostitution, pornography, stripping, as well as other sexual acts; however, prostitution, pornography, and stripping do not automatically meet the legal definition of sex trafficking under federal law.²⁵ For any commercial sex act with an adult to constitute sex trafficking, there must be force, fraud, or coercion.²⁶ When a commercial sex act is with a minor, it is automatically considered sex trafficking.²⁷

Sex trafficking not only enslaves adults, but children as well.²⁸ In the United States, over 100,000 children are victims of sex trafficking every year.²⁹ The average age at which a child is first exploited in prostitution is

23. 22 U.S.C. § 7102(9)(A).

24. 18 U.S.C. § 1591(e)(3) (2012); *accord* 22 U.S.C. § 7102(4).

25. Prostitution is solely a commercial sex act and is legally distinguishable from human trafficking because it has no requisite force, fraud, or coercion element. *See, e.g.*, 18 U.S.C. § 1591; CAL. PENAL CODE § 266i (West 2014). *See Human Trafficking, supra* note 11, for an explanation of how pimping qualifies as a form of sex trafficking.

26. *See* 18 U.S.C. § 1591; *cf. Human Trafficking, supra* note 11 (listing pimping behaviors that qualify as force, fraud, and coercion).

27. *See* 22 U.S.C. § 7102(9)(A). For purposes of human trafficking, a minor is any person who has not yet attained eighteen years of age. 18 U.S.C. § 1591(a).

28. *See* SHARED HOPE INT’L, 2013 PROTECTED INNOCENCE CHALLENGE 7 (2013) [hereinafter 2013 PIC REPORT], *available at* <http://sharedhope.org/wp-content/uploads/2013/11/ProtectedInnocenceChallenge2013.pdf>. A subset of sex trafficking in the United States is called “domestic minor sex trafficking.” *Id.* Domestic minor sex trafficking is synonymous with child sex slavery, child sex trafficking, and child prostitution; it is defined as the commercial sexual exploitation of American children within the United States’ borders. *Id.*

29. *Id.* Although children are often brought to the United States for the purpose of commercial sexual exploitation, sex trafficking also includes a large percentage of American children. *See* PROTECTION PROJECT REVIEW, *supra* note 7, at 32–33 (identifying the United States as a country of origin, transit, and destination for the commercial sexual exploitation of children). Victims of minor sex trafficking come from all backgrounds in terms of race, class, and geography. *Prostitution of Children*, U.S. DEP’T JUSTICE, <http://www.justice.gov/criminal/ceos/subjectareas/prostitution.html> (last visited Oct. 19, 2014). The victims are often, but not always, runaway or “throwaway” youths and those who have a history of physical or sexual abuse. *Id.* These children are seen as vulnerable and easy targets by pimps, who often lure them with promises of food, clothing, shelter, attention, friendship, and love. *Id.* These false promises cause the child victim to feel dependent on the pimp for life necessities, survival, and affection. *Id.* But the pimp betrays the trust of the child and engages the victim in commercial sex acts. *Id.* Another common tactic used by pimps is isolating the victims by moving them away from family and friends. *Id.* Pimps can be so manipulative and controlling that the victims are unable to leave the pimp on their own. *Id.*

thirteen,³⁰ and children as young as toddlers and even infants are exploited in pornography.³¹ Unfortunately, the only aspect of child sexual exploitation that has decreased in recent years is the age of the child exploited.³² Conversely, there has been an increase in the demand for younger and younger girls in sex trafficking.³³

As with slavery, there is a huge economic motive to hide the truth of sex trafficking.³⁴ The realities of sex trafficking are often veiled by euphemisms such as “speech,” “adult entertainment,” or “sexual expression.”³⁵ But behind legal commercial sex venues—including strip clubs, escort services, and adult pornography—there exists a hidden criminal black market that uses sex trafficking victims to satisfy the surplus demand for the advertised sexual services.³⁶ When the harm involved in sex trafficking is not visible and remains unknown, the assumption is that commercial sex is a free choice, voluntary, and consensual.³⁷ Not so. Several scholars conclude that women and girls are forced into the “business” of prostitution and

30. *FAQs*, SHARED HOPE INT’L, <http://sharedhope.org/learn/faqs/> (last visited Oct. 19, 2014).

31. *Child Pornography*, U.S. DEP’T JUSTICE <http://www.justice.gov/criminal/ceos/subjectareas/cchildporn.html> (last visited Oct. 19, 2014).

32. *See id.* (quoting Eric Holder Jr., U.S. Attorney General, Address at the National Strategy Conference on Combating Child Exploitation (May 19, 2011)).

33. The demand for young children is based, in part, upon the perception of their innocence and the lower probability that they are infected with sexually transmitted diseases. SHARED HOPE INT’L, *DEMAND: A COMPARATIVE EXAMINATION OF SEX TOURISM AND TRAFFICKING IN JAMAICA, JAPAN, THE NETHERLANDS, AND THE UNITED STATES* 5 (2012) [hereinafter *DEMAND*], available at <http://sharedhope.org/wp-content/uploads/2012/09/DEMAND.pdf>.

34. *See Why Trafficking Exists*, POLARIS PROJECT, <http://www.polarisproject.org/component/content/article/1-national-human-trafficking-hotline/240-why-trafficking-exists-> (last visited Jan. 28, 2015).

35. *See generally* Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 *YALE J.L. & FEMINISM* 109, 127–32 (2006) [hereinafter *Prostitution, Trafficking, and Cultural Amnesia*] (explaining the hidden realities of the sex trafficking industry).

36. Sex trafficking is a market-driven criminal industry and has been found in “fake massage businesses, online escort services, residential brothels, in public on city streets and in truck stops, strip clubs, hotels and motels, and elsewhere.” *Sex Trafficking in the U.S.*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/sex-trafficking-in-the-us> (last visited Oct. 19, 2014).

37. Drawing a distinction by classifying “voluntary” prostitution as “sex work” and “forced” prostitution as “trafficking” necessarily implies that “there is a class of women to whom human rights laws against sexual harassment at work . . . will not apply” because sexual harassment laws cannot fit when the work is sexual harassment. Catharine A. MacKinnon, *Pornography as Trafficking*, 26 *MICH. J. INT’L L.* 993, 997–98 (2005).

pornography by sex discrimination, race discrimination, poverty, abandonment, sexual and verbal abuse, poor education or no education, or a job that does not pay a living wage.³⁸

Sex trafficking is extremely detrimental to the physical and psychological health of women and children.³⁹ Similar to the force and coercion used by batterers, the methods traffickers and buyers use to control their victims include “economic exploitation, social isolation, verbal abuse, threats, physical violence, sexual assault, captivity, minimization and denial of their use of physical violence and abuse.”⁴⁰ Sex trafficking victims enslaved in prostitution and pornography are often raped over and over

38. See, e.g., *Prostitution, Trafficking, and Cultural Amnesia*, *supra* note 35, at 110–11. Commercial sex is “‘chosen’ as a job by those who have the fewest real choices available to them.” *Id.* at 118. Commercial sex work systematically discriminates against women, the young, the poor, and ethnically subordinated groups. *Id.*

Until conditions of sex and race equality exist, laws must protect people from exploitation that might appear to be voluntary or consenting. The critical question with respect to sex, race, and class-based discrimination in prostitution is not “did she consent?” but “has she been offered the real choice to exist without prostituting?”

Id.

39. *Prostitution, Trafficking, and Cultural Amnesia*, *supra* note 35, at 111; see *infra* notes 45–48 and accompanying text. Sex trafficking victims suffer from serious “physical ailments, including [venereal diseases,] tuberculosis, infections, drug addi[c]tion, malnutrition, and physical injuries resulting from violence inflicted upon them.” *Prostitution of Children*, *supra* note 29.

40. *Prostitution, Trafficking, and Cultural Amnesia*, *supra* note 35, at 111. Pimps manipulate children by using physical, emotional, and psychological abuse—including beating, raping, and torturing the victims. *Prostitution of Children*, *supra* note 29. Some pimps get their victims addicted to drugs and alcohol in order to keep the victims dependent upon the pimps for supply and to make the victims more susceptible to the pimps’ demands. *Id.*; see also *Prostitution, Trafficking, and Cultural Amnesia*, *supra* note 35, at 111. The United States Department of State explains,

The use of violence to enslave trafficking victims is pervasive, but there are other—more subtle—forms of fraud and coercion that also prevent a person from escaping compelled servitude.

A number of other factors that may lead to a person being overlooked as a victim by authorities are a sex trafficking victim[’s] initial consent, the belief that they are in love with their trafficker, not self-identifying as a victim, or being away from a pimp’s physical control with what seems to be ample opportunity to ask for help or flee. None of these factors, taken alone or in sum, mean that someone is not a victim of a severe form of trafficking.

OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERS., U.S. DEP’T OF STATE, PREVENTION: FIGHTING SEX TRAFFICKING BY CURBING DEMAND FOR COMMERCIAL SEX ACTS (2013) [hereinafter PREVENTION], available at <http://www.state.gov/documents/organization/211845.pdf>; see also OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERS., U.S. DEP’T OF STATE, MISPERCEPTIONS LEAD TO MISSED OPPORTUNITIES TO IDENTIFY VICTIMS (2013), available at <http://www.state.gov/documents/organization/211839.pdf> (dispelling misperceptions about human trafficking to improve identification of victims).

again.⁴¹ Besides physical abuse, sex trafficking leads to severe short- and long-term psychological effects, such as depression, low self-esteem, feelings of hopelessness, and even PTSD.⁴² For those enslaved in pornography there is a constant fear of its dissemination.⁴³ Because of the devastating toll sex trafficking exacts on the health and well-being of women, girls, and communities, sex trafficking warrants classification as a public health concern and recognition by the law.⁴⁴

Many experts explain that sex trafficking promotes gender inequality because it leads to the objectification and commodification of women and girls.⁴⁵ During a commercial sex act “a woman does not stay whole; she loses her name, her identity, and her feelings” as she becomes an object for another’s sexual pleasure.⁴⁶ In order to cope and survive, sex trafficking victims must disassociate themselves from their actions; traffickers often give victims drugs and alcohol to numb the victims’ pain, make the victims more compliant, and keep the victims addicted and dependent on the traffickers.⁴⁷ As a result, victims are stuck in a cycle where they feel powerless and will often return to “their pimp” even after being rescued—a response similar to those suffering from battered-women syndrome.⁴⁸

41. See, e.g., *Prostitution, Trafficking, and Cultural Amnesia*, *supra* note 35, at 113.

42. *Prostitution of Children*, *supra* note 29; see also *Prostitution, Trafficking, and Cultural Amnesia*, *supra* note 35, at 122–26 (noting that the same acts that are considered part of the job description of prostitution and pornography can also be classified as torture, and comparing the psychological effects of torture and prostitution). See generally Melissa Farley, “Renting an Organ for Ten Minutes:” What Tricks Tell Us About Prostitution, Pornography, and Trafficking, in *PORNOGRAPHY: DRIVING THE DEMAND IN INTERNATIONAL SEX TRAFFICKING* 154 (David E. Guinn & Julie DiCaro eds., 2007) [hereinafter *Renting an Organ*], available at <http://www.prostitutionresearch.com/FarleyRentinganOrgan11-06.pdf> (describing the effect of pornography on women in prostitution).

43. See *Child Pornography*, *supra* note 31.

44. See Kathleen Wirth, *The Role of Sex Trafficking in H.I.V.*, N.Y. TIMES (Nov. 28, 2013, 7:19 PM), <http://www.nytimes.com/roomfordebate/2013/11/28/how-will-aids-be-eradicated/the-role-of-sex-trafficking-in-hiv> (arguing that sex trafficking is clearly a risk factor for HIV and should not be ignored in the quest to end AIDS).

45. See, e.g., *Prostitution, Trafficking, and Cultural Amnesia*, *supra* note 35, at 115.

46. *Id.*; see also discussion *infra* note 111.

47. See *Prostitution, Trafficking, and Cultural Amnesia*, *supra* note 35, at 116 (discussing the role of drugs and alcohol in sex trafficking). See generally SHELLEY LUBBEN, <https://www.shelleylubben.com/> (last visited Jan. 29, 2015) (discussing the drug abuse prevalent in the porn industry).

48. See *FAQs*, *supra* note 30. “Traffickers are master manipulators and employ tactics to create a trauma bond between the victim and trafficker.” *Id.* These tactics include physical, emotional, and psychological abuse, as well as threats of violence against a victim or a victim’s loved ones. *Id.*

B. Demand

1. Defining Demand

Trafficking of humans is a lucrative business.⁴⁹ Sex trafficking “is the fastest-growing business of organized crime and the third-largest criminal enterprise in the world.”⁵⁰ In the United States alone, human trafficking is a \$9.8 billion industry.⁵¹ This industry “operates under a well-established business model”⁵²: distribution (the traffickers⁵³ and the facilitators⁵⁴), supply

49. See *Human Sex Trafficking*, *supra* note 5.

50. *Id.*

51. SHARED HOPE INT’L, DOMESTIC MINOR SEX TRAFFICKING IN THE U.S. 1 (2012), *available at* <http://sharedhope.org/wp-content/uploads/2013/11/DMSTinfographic.pdf>.

52. GLOBAL CENTURION FOUNDATION, *Who We Are*, <http://www.globalcenturion.org/about/> (last visited Jan. 29, 2015) [hereinafter GLOBAL CENTURION].

53. The Trafficking Victims Protection Act (TVPA) defines “severe trafficking” as inducing a commercial sex act “by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.” 22 U.S.C. § 7102(9)(A) (2012). Trafficking also occurs through the “recruitment, harboring, transportation, provision, or obtaining” of another person “for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery,” or “for the purpose of a commercial sex act.” § 7102(9)(B)–(10).

54. Facilitators aid traffickers in trafficking victims. *The Facilitators*, POLARIS PROJECT, <http://www.polarisproject.org/component/content/article/1-national-human-trafficking-hotline/243-the-facilitators> (last visited Jan. 30, 2015). A facilitator is “any person who profits, directly or indirectly, from the sale of commercial sex acts.” DEMAND, *supra* note 33, at 16. Facilitators can either actively or passively support the sex trafficking business. See *id.* at 4. “In some cases, businesses are aware of their involvement in trafficking, and the profits they generate outweigh reservations they may have about their role. In other cases, businesses are unaware and find it difficult to know which of their customers are human traffickers.” *The Facilitators*, *supra*; see also *Corporate America Cashing In on Porn*, ABC NEWS (Mar. 25, 2013), <http://abcnews.go.com/Business/story?id=87275&page=1&singlePage=true> (explaining how many corporate businesses—such as web entrepreneurs, producers, hoteliers, blue-chip corporations, and cable companies—have a stake in the hard-core pornography industry). One of the biggest facilitators in the United States is Backpage.com, an online advertising website. Nicholas D. Kristof, *Financiers and Sex Trafficking*, N.Y. TIMES, Mar. 31, 2012, http://www.nytimes.com/2012/04/01/opinion/sunday/kristof-financiers-and-sex-trafficking.html?_r=0.

There are two types of facilitators: individual and institutional facilitators. DEMAND, *supra* note 33, at 4. “Individual facilitators include pimps, traffickers, cab drivers, document forgers, pornographers, corrupt or negligent officials in governments or businesses, and other individuals benefiting directly or indirectly from the commercial sex markets.” *Id.* “Institutional facilitators are the businesses, governments and other institutions benefiting in some way from the commercial sex markets . . .” *Id.* Facilitators are often complicit “through inaction, tolerance or poor management.” *Id.* The support of facilitators is essential to maintaining trafficking networks by

(the victims⁵⁵), and demand (the buyers⁵⁶).⁵⁷ The economic business principles of supply and demand also affect sex trafficking.⁵⁸ When demand increases, supply grows to meet the demand.⁵⁹ Conversely, if demand decreases, the supply, likewise, will decrease.⁶⁰ Applying these principles to sex trafficking, the demand of buyers for commercial sex acts creates a need for a supply, which is filled by sex trafficking victims.⁶¹ This makes buyers

providing advertising, transportation, and spaces to operate. *The Facilitators, supra*.

55. Victims are legally defined by the TVPA as people subjected to the following acts or practices:

[S]ex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; . . . the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery[;] . . . [or] the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.

22 U.S.C. § 7102(9), (10), (14), (15).

56. A buyer is:

A person who solicits or engages in, or attempts to engage in commercial sex acts with a [victim]. This includes buyers . . . attempting to buy sex acts with a [victim], buyers who directly solicited a [victim] to engage in commercial sex, and buyers who purchased or attempted to purchase sex acts with a [victim] through a third person.

DEMANDING JUSTICE, *supra* note 15, at 19. There are three categories of buyers: situational, preferential, and opportunistic. DEMAND, *supra* note 33, at 3. Situational buyers are “those who engage [victims] in commercial sex because they are available, vulnerable and the practice is tolerated.” *Id.* Preferential buyers, including pedophiles, “have a [particular] sexual preference and shop specifically in the markets providing [their] preferred victim or service.” *Id.* “Opportunistic buyers are those who purchase sex indiscriminately because they do not care, are willfully blind to the age or willingness of the female, or are unable to differentiate between adults and minors.” *Id.*

The majority of buyers are not “abnormally sadistic psychopaths.” *Prostitution, Trafficking, and Cultural Amnesia, supra* note 35, at 129. Rather, they are average citizens of “all ages and from all social classes.” *Id.* Buyers receive the benefit of being labeled with names—such as “john,” “trick,” or “client”—that “do not carry the stigma and criminal weight they should.” DEMAND, *supra* note 33, at 3. In contrast, victims of sex trafficking are labeled as “slut,” “ho,” or “prostitute,” which encourages dehumanization of, and even aggression toward, the victims. *Id.*

57. GLOBAL CENTURION, *supra* note 52.

58. *Why Trafficking Exists, supra* note 34.

59. DEMAND, *supra* note 33, at 15.

60. *See id.*

61. *See id.* Closely related to the demand for sex trafficking victims is the sex tourism industry. *Id.* Sex tourism is “the travel by buyers of sexual services for the purpose of procuring sexual services from another person in exchange for money and/or goods.” *Id.* at 1. Sex trafficking and sex tourism are intertwined because sex trafficking supplies the demands presented by sex tourism. *Id.* at 6.

In the sex tourism markets, demand exceeds supply of women to provide the commercial

the driving force behind sex trafficking.⁶² Accordingly, addressing demand is the most immediate and effective way to stop sex trafficking.⁶³

sex services which buyers are groomed to expect through advertising and popular culture. Sex traffickers fill this deficiency by delivering women and children to meet the demand of buyers in sex tourism markets. This creates a single market of sexual exploitation in which sex tourism is fueled by sex trafficking.

Id. at 2 (emphasis added).

62. MELISSA FARLEY ET AL., *COMPARING SEX BUYERS WITH MEN WHO DON'T BUY SEX: "YOU CAN HAVE A GOOD TIME WITH THE SERVITUDE" VS. "YOU'RE SUPPORTING A SYSTEM OF DEGRADATION"* 7 (2011) [hereinafter *COMPARING SEX BUYERS*], available at <http://www.prostitutionresearch.com/pdfs/Farleyetal2011ComparingSexBuyers.pdf> ("Public concern is rapidly accumulating for the harms sex buyers perpetrate against women in prostitution with buyers increasingly recognized as drivers of the sex trafficking industry."). *But see* Stephanie M. Berger, Note, *No End in Sight: Why the "End Demand" Movement Is the Wrong Focus for Efforts to Eliminate Human Trafficking*, 35 HARV. J.L. & GENDER 523 (2012) (criticizing the "End Demand" movement as oversimplifying the issue and conflating sex trafficking with "sex work"). Although buyers are the driving force, this does not make them the only force or factor in promulgating sex trafficking.

63. PREVENTION, *supra* note 40 ("If there were no demand for commercial sex, sex trafficking would not exist in the form it does today. This reality underscores the need for continued strong efforts to enact policies and promote cultural norms that disallow paying for sex."); DEMAND, *supra* note 33, at 2 (explaining that the only effective method for eradicating sex trafficking is to target demand); Shared Hope Int'l, *Demand. Documentary (43-Minute Version)*, VIMEO, <http://vimeo.com/70637039> (last visited Jan. 30, 2015) [hereinafter *Demand Documentary*] (explaining that the most immediate way to address sex trafficking is for buyers to stop buying because without buyers, there is no sex market, and with no market, there are no victims).

Various organizations have undertaken to address and fight demand. *See, e.g.*, GLOBAL CENTURION, *supra* note 52 ("Global Centurion Foundation is a non-profit organization fighting human trafficking by focusing on the demand side of the equation—the perpetrators, exploiters, buyers, and end-users of human beings who fuel the market for forced labor and commercial sex."); *Research*, SHARED HOPE INT'L, <http://sharedhope.org/what-we-do/prevent/research/> (last visited Oct. 27, 2014) (researching the demand for domestic minor sex trafficking, compiling results, and publishing reports).

Others have called the "End Demand" movement "a misguided moral crusade" that disregards the fact that people enter the sex trade for a variety of reasons and ignores the needs of sex workers. Noy Thrupkaew, *A Misguided Moral Crusade*, N.Y. TIMES, Sept. 22, 2012, http://www.nytimes.com/2012/09/23/opinion/sunday/ending-demand-wont-stop-prostitution.html?pagewanted=all&_r=0 (explaining that the way to stop prostitution is to satisfy the demand for basic social services: "shelter, job opportunities and a responsive and sensitive law-enforcement system"). *But see* Rachel Durchslag, *Ending Demand is a Common-Sense Approach that Works*, HUFFINGTON POST (Sept. 27, 2012, 11:32 AM), http://www.huffingtonpost.com/rachel-durchslag/ending-demand-is-a-common_b_1917192.html (responding to Thrupkaew's article by explaining that "End Demand" movements advocate a variety of solutions "such as better accountability for traffickers, and social services for survivors of the sex trade"); *Why Trafficking Exists*, *supra* note 34 ("To ultimately solve the problem of human trafficking, it is essential to address these demand-driven factors, as well as to alter the overall market incentives of high-profit and low-risk that traffickers currently exploit.").

2. Fueling Demand

There are several factors that allow the demand for commercial sex to thrive. First, at its heart, demand is “fueled by the desires and whims of the buyer.”⁶⁴ These selfish desires are shaped and molded by culture.⁶⁵ In the United States, the sexualized popular culture has normalized and reduced the moral barriers to access commercial sex.⁶⁶ “Popular media, including certain books, movies, television shows, and music, sometimes glamorize and romanticize the commercial sex industry without properly acknowledging the presence of sex trafficking.”⁶⁷ Due to this culture of tolerance, buyers are groomed from a young age to glamorize commercial sex and even to express aggression towards women.⁶⁸ This glamorization, in turn, fuels the demand for commercial sex.⁶⁹ As long as American culture continues to normalize sexual images and activities, the commercial sex markets will continue to grow in the United States.⁷⁰

Second, demand continues to flourish due to the lack of laws criminalizing buyers coupled with the lack of enforcement of existing laws.⁷¹ Demand thrives, in part, because it is accompanied by low risk and high

64. *Demand Documentary*, *supra* note 63.

65. See *Why Trafficking Exists*, *supra* note 34.

66. See DEMAND, *supra* note 33, at 3. For instance, in the context of child pornography, the United States Department of Justice recognizes that the message conveyed through the images “erodes the societal mores which would otherwise inhibit [consumers] from satisfying that impulse. These images diminish the shame that someone might have felt about having an attraction to children, which lowers the barriers to indulging that attraction.” ALEXANDRA GELBER, U.S. DEP’T OF JUSTICE, RESPONSE TO “A RELUCTANT REBELLION” 5 (2009), available at <http://www.justice.gov/v/criminal/ceos/downloads/ReluctantRebellionResponse.pdf>.

67. *Why Trafficking Exists*, *supra* note 34.

68. See DEMAND, *supra* note 33, at 3.

69. See *id.*; cf. GELBER, *supra* note 66 (discussing how viewing child pornography is intrinsically linked to its creation, because if there was no market for illegal pictures or videos of child abuse, it would not been created in the first place).

70. See DEMAND, *supra* note 33, at 3. In the context of child pornography, the United States Department of Justice has recognized that “it is simply not possible to disconnect the collection, trade, viewing, and possession of [child pornography] from their production;” it is “a distinct and egregious form of child exploitation worthy of punishment in and of itself.” GELBER, *supra* note 66, at 4, 5. “Thus, the child pornography trafficking laws were conceived, not as a method to punish contact offenders, but one to stop the abuse of children by others by eliminating the market for such images.” *Id.* at 9.

71. *Why Trafficking Exists*, *supra* note 34. For instance, both federal law and California state law do not criminalize buyers of sex trafficking victims. See *infra* Part III.A–B.1 for a discussion of the current state of federal and California state law regarding sex trafficking.

profits.⁷² Without adequate consequences for commercial sex acts with sex trafficking victims, buyers have inadequate incentive or deterrence to stop buying.⁷³ There has been a lack of political and societal will, as well as resources, to bring buyers to justice.⁷⁴ However, American culture is starting to recognize the importance of fighting demand as awareness concerning sex trafficking increases.⁷⁵ “The goal of the various legislation and regulations is to make it more difficult to find sex for purchase, reducing the amount of sex for sale on the streets and in businesses and making it more difficult for men to purchase sex.”⁷⁶ Having statutes in place that criminalize buyers will only be beneficial if they are enforced.⁷⁷

Third, the demand for sex trafficking has increased as advances in technology have made purchasing sex more accessible, anonymous, and affordable.⁷⁸ In the United States, technology—specifically the Internet—is the single greatest facilitator of the commercial sex trade.⁷⁹ For instance, a

72. *Why Trafficking Exists*, *supra* note 34.

73. See DEMANDING JUSTICE, *supra* note 15, at 17–18. “Simultaneously, while blame is assigned to victims of sex trafficking, traffickers and buyers are able to benefit from being labeled with normalized names—johns, tricks, clients, ‘loverboys’ or pimps—which do not carry the stigma and criminal weight they should.” DEMAND, *supra* note 33, at 3. Moreover, pimping has been “normalized” in American culture and come to mean “an improvement upon” through television shows such as *Pimp my Ride* and video games such as *The Pimp Game*. *Id.* at 93–94.

74. See *Why Trafficking Exists*, *supra* note 34; see also DEMAND, *supra* note 33, at 3 (explaining how statistics reveal that prostitutes are still being prosecuted while buyers are ignored).

75. See discussion *supra* note 63.

76. Laura J. Lederer, *Addressing Demand: Why and How Policymakers Should Utilize Law and Law Enforcement to Target Customers of Commercial Sexual Exploitation*, 23 REGENT U. L. REV. 297, 305 (2011) (discussing the role of laws and law enforcement in targeting demand).

77. See *id.* at 299–305 (explaining the importance of enforcing laws penalizing patrons of sex).

78. See *Prostitution of Children*, *supra* note 29. The 2013 Trafficking in Persons (TIP) report explicitly mentions that traffickers in the United States use new technologies including social media and online websites. PROTECTION PROJECT REVIEW, *supra* note 7, at 44–45. Images and advertisements can now be shared instantaneously through a host of relatively new technology: streaming or downloadable media, email, peer-to-peer file sharing servers, online chat rooms, messaging services, video MP3 players, video and photo cell phones, and networked video game systems. DEMAND, *supra* note 33, at 19.

79. DEMAND, *supra* note 33, at 5. In the U.S., “commercial sex services and the victims providing those services are advertised extensively over the Internet, with a simple search of English language websites advertising escort services yielding 2.2 million results on Google.” *Id.* To maintain secrecy, many of the Internet sites advertising commercial sex services are dismantled within weeks or even days. *Id.* at 13. For example, one of the biggest forums for sex trafficking of minors in the United States is a website called backpage.com. Kristof, *supra* note 54.

Cell phones are also increasingly used to connect buyers with victims. DEMAND, *supra* note 33, at 5. This function further distances the trafficker from the action of enslaving as transactions

man, in the privacy of his own home, can view pornography or arrange to meet a prostitute with a simple click of a mouse and a credit card number.⁸⁰ As the United States Department of Justice explained,

Every [buyer] who receives sexually abusive images of [sex trafficking victims] is not acting within the four corners of his own home, but rather is a participant in . . . a global market with millions of members—a market which constantly demands that more [victims] be abused in order to create new images.⁸¹

“Running a ‘virtual brothel’ is safer and easier for [pimps] than selling girls on the street,” because once pornography is uploaded to the Internet for mass consumption, it is difficult, if not impossible, to distinguish what is the product of consent and what is the product of sex trafficking.⁸² Technological advances also “allow pimps and traffickers to expand their clientele base, which may expose victims to greater risks and dangers.”⁸³ For example, through the Internet, buyers are able to connect to “like-minded individuals” who tell them that it is normal to have certain sexual attractions or urges and that it is acceptable to act on those attractions or urges.⁸⁴ Technological advances are a large driving force in creating today’s cultural norms and are often shaped by the lowest impulses found in our culture, catering to a person’s selfish desires and enabling the demand for

are orchestrated via phone call rather than in person. *Id.*

80. The Internet has catered to a new and increasingly common phenomenon known as Webcam Child Sex Tourism (WCST), which occurs when adults pay to direct and view live-streaming video footage of children—usually in another country—performing sexual acts in front of a webcam. TERRE DES HOMMES, WCST FAQ 1 (2013), *available at* <http://www.terredeshommes.org/wp-content/uploads/2013/11/FAQ-English.pdf>. WCST conflates two forms of child sexual exploitation: child pornography and child prostitution. *Id.* The international federation Terre des Hommes in the Netherlands, which is raising awareness of WCST, has recognized the importance of addressing demand: “[W]e have shifted our attention to the demand side. If nothing is being done about the source of the problem, this phenomenon will only increase even further.” TDH-Netherlands, *Stop Webcam Child Sex Tourism!*, TERRE DES HOMMES (Nov. 4 2013), <http://www.terredeshommes.org/webcam-child-sex-tourism/> (YouTube video posted on web page).

81. GELBER, *supra* note 66, at 4.

82. *Victims of Sex Trafficking are Filmed and Photographed to Produce Porn*, STOP TRAFFICKING DEMAND, <http://stoptraffickingdemand.com/forced-acts-recorded/> (last visited Jan. 29, 2015) [hereinafter *Filmed and Photographed to Produce Porn*].

83. *See Prostitution of Children*, *supra* note 29.

84. *See* GELBER, *supra* note 66, at 5.

sex trafficking.⁸⁵

Fourth, pornography is a primary gateway for buyers to purchase humans for commercial sexual services.⁸⁶ Because of the significant role pornography plays in sex trafficking, discussion of this factor will be addressed in its own section below.

C. Pornography

Pornography plays a unique role in sex trafficking.⁸⁷ It can be both a form of sex trafficking⁸⁸ and a major contributing factor of demand by creating and fueling demand for itself, as well as for other commercial sex acts.⁸⁹ Nearly all buyers of commercial sex acts are also pornography users.⁹⁰ This can be explained, in part, by the fact that pornography changes

85. See Lee Siegel, *America the Vulgar*, WALL ST. J., Dec. 6, 2013, <http://online.wsj.com/news/articles/SB10001424052702304451904579238140379017148>. It was the pornography industry that was behind the success of commonplace “obscene images” by inventing streaming video websites, which confirm the validity of credit cards. *Id.*

Works are legally obscene if, under the *Miller* obscenity test, they are “works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *United States v. Miller*, 413 U.S. 15, 24 (1973). As one California court observed, “For better or worse, our society has developed a tolerance for a wide variety of exchanges of sex for money.” *Wooten v. Super. Ct.*, 113 Cal. Rptr. 2d 195, 206 (Ct. App. 2001). This tolerance and the sexualized culture of America have led to changing views of what is prurient and offensive, and thus what is legally obscene under *Miller*. See *Miller*, 413 U.S. at 24.

86. DEMAND, *supra* note 33, at 5.

87. Pornographic films and photographs of sex trafficking victims are used in many different ways. *Filmed and Photographed to Produce Porn*, *supra* note 82. For example, pimps may place pornography of the victims on their own websites for primary or supplemental income or use images to advertise sexual services by the victim. *Id.* Next, buyers may use their recordings as keepsakes and mementos, and even share the recordings with others to “brag” about what they have done. *Id.* Victims also may be forced to watch pornography to know what is expected of them or forced into the increasingly popular “Live Porn” in front of a webcam. *Id.* See generally MacKinnon, *supra* note 37 (discussing the role of pornography in sex trafficking).

88. Not all pornography production is legally considered sex trafficking, but all *child* pornography production is automatically considered sex trafficking, and any pornography production where force, fraud, or coercion is used with a person eighteen years of age or older also constitutes sex trafficking. See 18 U.S.C. § 1591 (2012); 22 U.S.C. § 7102 (2012).

89. MacKinnon, *supra* note 37, at 993, 1001; *Pornography Creates and Drives the Demand for Trafficked Women and Children*, STOP TRAFFICKING DEMAND, <http://stoptraffickingdemand.com/johns-acting-out/> (last visited Jan. 30, 2015) [hereinafter *Pornography Creates and Drives the Demand*]. “Using pornography is like drinking salt water. It looks like the real thing but is not; the more you drink, the thirstier you become.” MacKinnon, *supra* note 37, at 1001.

90. *Pornography is Often Used by Traffickers as a Tool*, STOP TRAFFICKING DEMAND,

a user's sexual taste⁹¹ and often leads users to "seek to act out what they have viewed in pornography."⁹² It is easier to recognize traditional sexual exploitation where the defendant and victim are face-to-face, but much harder to understand the severity of the crime or abuse when a computer stands in between.⁹³ Every person who "provides a sexually abusive image to someone else is saying that it is OK" to exploit children and sex trafficking victims in that way, which in turn "necessarily enables and emboldens others."⁹⁴

Pornography is comparable to an addictive drug and research has revealed that it rewires a viewer's brain.⁹⁵ Dubbed the "new narcotic," pornography, unlike other addictive substances such as alcohol or drugs, does not necessarily require *greater quantities* to satisfy the addiction but rather demands *more novel* pornographic content.⁹⁶ This novel content includes taboo sexual acts, sadomasochistic pornography, and child pornography.⁹⁷ Viewing this content desensitizes its users to the violence, degradation, and humiliation of women and children; users begin to think

<http://stoptraffickingdemand.com/training-tool/> (last visited Jan. 30, 2015).

91. *Id.* The United States Department of Justice recognizes that using child pornography can "desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer." GELBER, *supra* note 66, at 5. Likewise, viewing adult pornography can desensitize the viewer to the sexual abuse of sex trafficking victims used in the creation of pornography, prostitution, and other commercial sex acts. *See id.*

92. *Pornography Creates and Drives the Demand*, *supra* note 89.

93. GELBER, *supra* note 66, at 16.

94. *Id.* at 5.

95. Recent studies analyzing brain activity have shown that pornography addiction is no different from a chemical or substance addiction. Adam Withnall, *Pornography Addiction Leads to Same Brain Activity as Alcoholism or Drug Abuse, Study Shows*, INDEPENDENT (London), Sept. 22, 2013, <http://www.independent.co.uk/life-style/health-and-families/health-news/pornography-addiction-leads-to-same-brain-activity-as-alcoholism-or-drug-abuse-study-shows-8832708.html>. Children as young as eight have been exposed to pornography and are increasingly at risk of becoming addicted. John Donvan & Mary-Rose Abraham, *Is the Internet Driving Pornography Addiction Among School-Aged Kids?*, ABC NEWS (May 8, 2012), <http://abcnews.go.com/Technology/internet-driving-pornography-addiction-school-aged-kids/story?id=16297026&singlePage=true>. These children are especially susceptible to the negative effects and lasting consequences of pornography addiction. Sara Israelsen-Hartley, *Adolescent Addiction: When Pornography Strikes Early*, DESERET NEWS, Jan. 1, 2014, <http://www.deseretnews.com/article/865593311/Adolescent-addiction-When-pornography-strikes-early.html?pg=all>.

96. Morgan Bennett, *The New Narcotic*, PUB. DISCOURSE (Oct. 9, 2013), <http://www.thepublicdiscourse.com/2013/10/10846/>.

97. *Id.*; *see also Pornography Creates and Drives the Demand*, *supra* note 89 (explaining that pornography users "demand a constant stream of new, increasingly violent and fetishized content").

that what they see in pornography is normal, acceptable, and preferable.⁹⁸ Recognizing this effect, traffickers often force victims to watch pornography to learn what is expected of them.⁹⁹

Despite laws against child pornography,¹⁰⁰ pornography is not limited to

98. *Pornography is Often Used by Traffickers as a Tool*, *supra* note 90.

99. *Id.*

100. In *New York v. Ferber*, 458 U.S. 747 (1982), the United States Supreme Court held that child pornography is not protected as “speech” under the First Amendment and is subject to regulation by the states. *Ferber* was convicted under a New York statute that prohibited the distribution of materials that show children engaged in sexual conduct, regardless of whether the material was found to be obscene. *Id.* at 752. The Court upheld the statutes because “[s]tates are entitled to greater leeway in the regulation of pornographic depictions of children,” and it gave five reasons for why the regulation of child pornography did not violate the First Amendment. *Id.* at 756–64.

First, the state has a compelling interest in “safeguarding the physical and psychological well-being of a minor” and “the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.” *Id.* at 756–58 (quoting *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1984)). Second, the distribution of child pornography is intrinsically related to the sexual abuse of the children. *Id.* at 759. Part of the harm to the child occurs through the permanent record created of the child’s participation, and its circulation exacerbates that harm. *Id.* If the production of child pornography—which requires the sexual exploitation of children—is to be effectively controlled, the distribution network must be closed. *Id.* at 759–60. The Court explained that the most effective, if not the only practical way for this to occur is to allow the states freedom to impose severe criminal penalties on those who sell, advertise, or otherwise promote child pornography. *Id.* at 760. The Court rejected an obscenity requirement because regardless of the value of the material, a child can still be harmed, exploited, or abused. *Id.* at 761; *see* discussion *supra* note 85. Third, the economic motive for advertising and selling child pornography makes it an integral part of its production. *Ferber*, 458 U.S. at 761–62. Fourth, the Court stated that there was little, if any, value in allowing child pornography. *Id.* at 762–63. Fifth, it is not incompatible with the Court’s earlier decisions to recognize and classify child pornography as a category of “speech” outside the protection of the First Amendment. *Id.* at 763.

Ferber allows states to regulate and criminalize the creation and possession of child pornography, but the Court clarified the scope of this power in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In *Free Speech Coalition* the Supreme Court held that a statute prohibiting virtual child pornography—or child pornography that does not use an actual child—violates the First Amendment. *Id.* at 239, 256. The Court explained that the *Ferber* decision was based upon *how* child pornography was made, not *what* it communicated. *Id.* at 251. The Court likened virtual child pornography to cartoons, video games, and candy, explaining that although “innocent” things can be misused, that misuse is not a legitimate reason to prohibit them. *Id.* The Court reasoned that prohibiting virtual child pornography would merely protect children from its content, but would not protect them from those who would commit other crimes. *Id.* at 252. The mere tendency of speech, such as virtual child pornography, to encourage unlawful acts is an insufficient reason to ban it. *Id.* at 253. *Free Speech Coalition* reveals that in *Ferber* the Supreme Court was concerned about harm to actual children in the production of child pornography, not the idea communicated by child pornography itself. *See id.* at 251.

In accordance with *Ferber* and *Free Speech Coalition*, California has several statutes criminalizing the possession or control of any material where “the matter depicts a person under 18

consenting adults.¹⁰¹ One out of every five pornographic images is of a child.¹⁰² Over half of all child pornography is produced in the United States.¹⁰³ Sales of these illegal images bring in over \$3 billion annually in the United States alone.¹⁰⁴ Emerging trends in pornography reveal an increasing number of images depicting very young children, including toddlers and infants.¹⁰⁵ Alarming, an increasing number of these images also depict sadistic and violent child sexual abuse.¹⁰⁶ “[C]hild pornography collectors never innocuously download images in ‘private.’ Rather, they are the engine of demand that fuels the molestation of children to create more supply.”¹⁰⁷

Under the TVPA, child pornography constitutes sex trafficking if anything of value was given to or received by any person.¹⁰⁸ For adult pornography to classify as sex trafficking there must be force, fraud, or coercion, as well as something of value that was given to or received by any person.¹⁰⁹ A woman could originally consent to make a pornographic film, but the instant she is physically or verbally threatened, says no and is physically forced to continue, or is impaired by drugs and alcohol, there is likely sufficient force, fraud, or coercion to qualify as sex trafficking.¹¹⁰

years of age personally engaging in or simulating sexual conduct.” CAL. PENAL CODE § 311.11(a) (West 2014). However, California’s penalties for possessing child pornography are much lower than federal penalties. See SHARED HOPE INT’L, PROTECTED INNOCENCE CHALLENGE 2013 ANALYSIS & RECOMMENDATIONS: CALIFORNIA 18–20 (2013), available at http://sharedhope.org/PICframe3/analysis/PIC_AR_2013_CA.pdf.

101. Minors cannot legally consent to participate in pornography, but once a person reaches the age of 18 they can legally consent to participate in pornography. See *Ferber*, 458 U.S. 747. It does not make sense, however, that someone could legally consent to engage in pornography for consideration, but not prostitution. But see Part III.B (discussing the nuances California makes between prostitution and pornography production).

102. *FAQs*, *supra* note 30.

103. *Id.*

104. *Id.*

105. *Child Pornography*, *supra* note 31.

106. *Id.*

107. GELBER, *supra* note 66, at 4.

108. See 22 U.S.C. § 7102(9)(A) (2012).

109. See § 7102(9)(B).

110. See *Trafficking Within the Professional Porn Industry*, STOP TRAFFICKING DEMAND, <http://stoptraffickingdemand.com/trafficking-within-the-industry/> (last visited Mar. 21, 2014). There is growing concern about the nature of consent by porn stars, and many question whether those who “choose” to enter the industry are giving informed consent. See *FAQs*, SHELLEY LUBBEN, <https://www.shelleylubben.com/faq> (follow “Don’t Women Make a Choice to Be in Porn?”).

Pornography has a larger impact on creating a culture of tolerance for commercial sex acts and, by extension, sex trafficking. Pornography sells more than an image or product; it sells values and concepts of sexuality and normalcy.¹¹¹ Pornography helps groom buyers to see women and children as objects of sexual gratification.¹¹² It helps train buyers to selfishly demand and become consumers of commercial sex.¹¹³

hyperlink) (last visited Oct. 29, 2014) [hereinafter *Porn FAQs*].

The only education young women receive about the porn industry is FROM the porn industry where glamour, fame and fortune is promised when in reality the only promise the porn industry should be making to young women are sexually transmitted diseases, illegal and hazardous work conditions, drugs and alcohol addiction, threats to sue them, coercion to sign contracts they aren't even educated enough to read or understand, threats for non-payment when they ruin scenes for things like crying or vomiting, the physical toll porn takes on their bodies, and the regret of having their movies posted on the internet for a life time where family members and friends may find them.

Id.

111. See *Pornography is Often Used by Traffickers as a Tool*, *supra* note 90.

Parallels can be drawn between pornography and gender representation in advertising. See *Killing Us Softly 4—Trailer [Featuring Jean Kilbourne]*, JEAN KILBOURNE (Aug. 24, 2012), <http://www.jeankilbourne.com/videos/> (YouTube video posted on web page). Research has shown that the objectification of women in the media has created a climate in which there is widespread violence against women because “[t]urning a human being into a thing is almost always the first step toward justifying violence against that person.” *Id.* “Ads sell more than products. They sell values, they sell images, they sell concepts of love and sexuality, of success, and perhaps most important, of normalcy—to a great extent, they tell us who we are and who we should be.” *Id.* Likewise, increasing the pornographic and sexual images used in advertising leads to their normalization and acceptance in the culture, which in turn validates the use of porn and the use of women as objects for sexual pleasure. See *id.*

112. See *Pornography is Often Used by Traffickers as a Tool*, *supra* note 90; *Pornography Creates and Drives the Demand*, *supra* note 89. Although many try to ignore it,

[t]here is no escaping the fact that obscenity and pornography produced in the United States damages, demeans and degrades people—including innocent children—around the world. The question is: what are we going to do about it and do we care enough to insist that the laws against obscenity be enforced?

Janice Shaw Crouse, *Pornography and Sex Trafficking*, CONCERNED WOMEN FOR AM. (May 19, 2008), <http://www.cwfa.org/pornography-and-sex-trafficking/>.

113. See DEMAND, *supra* note 33, at 17; see also THE DEFENDERS USA, 4 COMMON MYTHS ABOUT COMMERCIAL SEX (2012) available at http://sharedhope.org/wp-content/uploads/2013/12/Defenders-Common-Myths_UPDATE.pdf (citing a study of 932 sex addicts where “90% of the men, and 77% of the women indicated that looking at pornography ‘played a significant role in their addiction’”).

III. CURRENT STATE OF THE LAW

A. *Federal Law*

Human trafficking in the form of sex trafficking and labor trafficking was criminalized with the enactment of the Trafficking Victims Protection Act of 2000 (TVPA).¹¹⁴ Congress defined “sex trafficking” as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act” and identified “severe forms of trafficking in persons” as a commercial sex act “induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.”¹¹⁵ A minor who engages in any commercial sex act cannot legally consent and is automatically considered a victim of sex trafficking.¹¹⁶ But once a person has attained eighteen years of age, force, fraud, or coercion is needed to establish status as a victim.¹¹⁷

The TVPA has been reauthorized and updated every few years.¹¹⁸ In its current state the TVPA clearly applies to traffickers and facilitators, but its language does not explicitly apply to buyers.¹¹⁹ The first and only federal appellate court to consider whether the TVPA applies to buyers was the Eighth Circuit in 2013. In *United States v. Jungers*,¹²⁰ as a matter of first impression, the Eighth Circuit found that “the TVPA definition of ‘sex trafficking’ . . . readily includes the actions of a purchaser whose sole purpose is *obtaining* a child for sex.”¹²¹ The court explained that “[n]othing

114. TVPA, *supra* note 20.

115. 22 U.S.C. § 7102(9)–(10) (2012).

116. *See* 18 U.S.C. § 1591(a)–(c) (2012).

117. § 1591(a)–(b)(1).

118. *See, e.g.*, Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, 127 Stat. 54; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, 122 Stat. 5044 (codified as amended in scattered sections of Titles 6, 8, 18, 22, 28, and 42 of the U.S. Code); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109–164, 119 Stat. 3558; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108–193, 117 Stat. 2875 (codified as amended in scattered sections of Titles 8, 18, and 22 of the U.S. Code); TVPA, *supra* note 20.

119. *See* TVPA, *supra* note 20.

120. (*Jungers II*), 702 F.3d 1066 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 167 (2013). In text, this case is referred to as “*Jungers*,” but in footnotes, the Eighth Circuit’s decision is referred to as “*Junger II*” to distinguish between the Eighth Circuit decision and the district court’s decision, which has same name and is referred to in this Comment as “*Jungers I*.”

121. *Id.* at 1072 (emphasis added). In *Jungers II*, Jungers and Bonestroo were each convicted by

in the text of [the sex trafficking statute] expressly limits its provisions to suppliers or suggests Congress intended categorically to exclude purchasers or consumers (johns) of commercial sex acts whose conduct otherwise violates [the sex trafficking statute].”¹²² This question has come before only a few other district courts, and it is unclear whether other circuits or states with comparable statutes would find the Eighth Circuit’s reasoning persuasive and would apply the human trafficking statute’s words, such as “obtains,” to buyers.¹²³

Because Congress was not sufficiently clear in its intention “to include ALL of the actors in the crime of sex trafficking, including buyers,” several federal legislators intend to clarify that the actions of buyers, the demand, is

jury for attempted sex trafficking of a minor in violation of the TVPA. *Id.* at 1067. In both cases (which were combined on appeal), the district courts granted the motions for judgment of acquittal because Jungers and Bonestroo were merely purchasers and not traffickers or suppliers. *Id.* at 1068. The Eighth Circuit disagreed and concluded that “[t]he plain and unambiguous provisions of [the sex trafficking statute found in] 18 U.S.C. § 1591 apply to both suppliers and consumers of commercial sex acts.” *Id.* at 1069. See generally Samantha Healy Vardaman & Christine Raino, *Prosecuting Demand as a Crime of Human Trafficking: The Eighth Circuit Decision in United States v. Jungers*, 43 U. MEM. L. REV. 917 (2013) (discussing the implications of the Eighth Circuit case applying the word “obtains” to buyers).

122. *Jungers II*, 702 F.3d at 1070. The Eighth Circuit explained that the words of the statute do not lend themselves to a limiting or restrictive interpretation because “the expansive language of [the sex trafficking statute] criminalizes a broad spectrum of conduct.” *Id.* (internal quotation marks omitted). The court reasoned that Congress made no specific indication that the statute applied only to traffickers and suppliers or that it excluded buyers. *Id.* at 1075. Moreover, “[t]he term ‘trafficking’ does not inherently exempt purchasers.” *Id.* at 1072. The Eighth Circuit mentioned specifically, “The ordinary and natural meaning of ‘obtains’ and the other terms Congress selected in drafting [the sex trafficking statute] are broad enough to encompass the actions of both suppliers and purchasers of commercial sex acts.” *Id.* at 1071. The court held that the sex trafficking statutes could apply “to a purchaser of commercial sex acts who violates the statute’s terms.” *Id.* at 1075.

123. In an unpublished decision, *Fierro v. Taylor*, No. 11-CV-08753 (S.D.N.Y. July 2, 2012) (on file with author), the Southern District of New York held that the plain language of the TVPA—specifically 18 U.S.C. § 1591 (2012)—is unambiguous and did not apply to buyers of sex trafficking victims. *Id.* at *9. The New York district court found *United States v. Bonestroo*, No. CR-11-40016-01-KES, 2012 WL 13704 (D.S.D. Jan. 4, 2012), *rev’d sub nom. Jungers II*, 702 F.3d 1066, and *United States v. Jungers (Jungers I)*, 834 F. Supp. 2d 930 (D.S.D. 2011), *rev’d*, 702 F.3d 1066, persuasive and agreed with those courts that “the entire language and design of the statute as a whole indicates that it is meant to punish those who are the providers or pimps of children, not the purchasers or the johns.” *Id.* at *7 (quoting *Bonestroo*, 2012 WL 13704, at *4). However, both the *Bonestroo* and *Jungers I* decisions were overturned by the Eighth Circuit’s ruling in *Jungers II* on January 7, 2013. *Jungers II*, 702 F.3d at 1067. *Jungers II* is not binding on the Southern District of New York, which is part of the Second Circuit, and it is unknown how the Second Circuit would rule after the Eighth Circuit’s decision in *Jungers II* or if *Fierro* was appealed.

beyond a doubt part of the trafficking crime.¹²⁴ For instance, during the 113th Congress, the “End Sex Trafficking Act of 2013” (End Sex Trafficking Act) was cross-filed with bi-partisan sponsors in both the House and the Senate to amend the TVPA to include language that unambiguously covers buyers by adding the words “solicits” and “patronizes” to the sex trafficking statute.¹²⁵ However, it never made it out of committee and died before it could be enacted.¹²⁶ Similar acts have since been proposed by the 114th Congress.¹²⁷ Passage of the End Sex Trafficking Act or a similar act would draw a bright line in criminalizing buyers of sex trafficking victims.

B. California State Law

1. Human Trafficking Statute

California has a human trafficking statute,¹²⁸ but it does not adequately address demand. California’s human trafficking statute states, “[A]ny person who deprives or violates the personal liberty of another^[129] with the intent to obtain forced labor or services,^[130] is guilty of human

124. Taryn Offenbacher, *Buyer Beware: Legislators Tighten Laws to Target Buyers*, SHARED HOPE INT’L (Sept. 16, 2013), <http://sharedhope.org/2013/09/16/buyer-beware-legislators-tighten-laws-to-target-buyers/>.

125. H.R. 2805, 113th Cong. (2013); S. 1354, 113th Cong. (2013) [hereinafter collectively “End Sex Trafficking Act”]; 18 U.S.C. § 1591 (entitled “Sex trafficking of children or by force, fraud, or coercion”).

126. *End Sex Trafficking Act of 2013* (2013; 113th Congress H.R. 2805), GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr2805> (last visited Feb. 10, 2015); *End Sex Trafficking Act of 2013* (2013; 113th Congress S. 1354), GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s1354> (last visited Feb. 10, 2015).

127. See, e.g., *Justice for Victims of Trafficking Act of 2015* (H.R. 181), GOVTRACK.US, <https://www.govtrack.us/congress/bills/114/hr181> (last visited Feb. 10, 2015); *Combat Human Trafficking Act of 2015* (S. 140), GOVTRACK.US, <https://www.govtrack.us/congress/bills/114/s140> (last visited Feb. 10, 2015).

128. CAL. PENAL CODE § 236.1 (West 2014).

129. Pursuant to California’s human trafficking statute:

“Deprivation or violation of the personal liberty of another” includes substantial and sustained restriction of another’s liberty accomplished through force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, under circumstances where the person receiving or apprehending the threat reasonably believes that it is likely that the person making the threat would carry it out.

Id. § 236.1(h)(3).

130. “‘Forced labor or services’ means labor or services that are performed or provided by a person and are obtained or maintained through force, fraud, duress, or coercion, or equivalent

trafficking”¹³¹ Regarding sex trafficking specifically, the statute provides, “Any person who deprives or violates the personal liberty of another with the intent to effect or maintain a violation of [various commercial sexual exploitation crimes] is guilty of human trafficking”¹³²

California’s human trafficking statute explicitly applies to traffickers and facilitators, but it cannot be extended, in its current form, to buyers of either minor or adult sex trafficking victims for several reasons.¹³³ First,

conduct that would reasonably overbear the will of the person.” *Id.* § 236.1(h)(5). Of the conduct listed, only duress and coercion are defined in the statute. *See id.* § 236.1.

“Duress” includes a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to cause a reasonable person to acquiesce in or perform an act which he or she would otherwise not have submitted to or performed; a direct or implied threat to destroy, conceal, remove, confiscate, or possess any actual or purported passport or immigration document of the victim; or knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or immigration document of the victim.

Id. § 236.1(h)(4).

“Coercion” includes any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; the abuse or threatened abuse of the legal process; debt bondage; or providing and facilitating the possession of any controlled substance to a person with the intent to impair the person’s judgment.

Id. § 236.1(h)(1).

131. *Id.* § 236.1(a).

132. *Id.* § 236.1(b). The twelve commercial sexual exploitation crimes enumerated in the human trafficking statute are: (1) procurement (CAL. PENAL CODE § 266 (West 2014)); (2) pimping (CAL. PENAL CODE § 266h (West 2014)); (3) pandering (CAL. PENAL CODE § 266i (West 2014)); (4) procurement of child under age 16 for lewd or lascivious acts (CAL. PENAL CODE § 266j (West 2014)); (5) abduction of minor for prostitution (CAL. PENAL CODE § 267 (West 2014)); (6) sent or brought into state for sale or distribution; possessing, preparing, publishing, producing, developing, or printing within state; matter depicting sexual conduct by minor (CAL. PENAL CODE § 311.1 (West 2014)); (7) sending or bringing into state for sale or distribution; printing, exhibiting, distributing, exchanging, or possession within state; matter depicting sexual conduct by minor (CAL. PENAL CODE § 311.2 (West 2014)); (8) sexual exploitation of a child (CAL. PENAL CODE § 311.3 (West 2014)); (9) employment or use of minor to perform prohibited acts (CAL. PENAL CODE § 311.4 (West 2014)); (10) advertising or promoting sale or distribution; solicitation (CAL. PENAL CODE § 311.5 (West 2014)); (11) participation in, or production or presentation of, obscene live conduct in public place (CAL. PENAL CODE § 311.6 (West 2014)); and (12) extortion (CAL. PENAL CODE § 518 (West 2010)).

133. SHARED HOPE INT’L, PROTECTED INNOCENCE CHALLENGE: CALIFORNIA REPORT CARD 2013, at 1 (2013) [hereinafter CALIFORNIA REPORT CARD 2013], available at http://sharedhope.org/PICframe3/reportcards/PIC_RC_2013_CA.pdf. California’s human trafficking law cannot be used to prosecute demand and none of the criminal laws incorporated into the human trafficking law includes the crime of buying sex with a minor. *Id.*; see PENAL § 236.1; statutes cited *supra* note 132.

there is no direct language in the human trafficking statute that applies to buyers.¹³⁴ Although the verb “obtains” is included in the definition of trafficking for forced labor or services, “obtains” does not clearly apply to buyers, and California courts could easily hold that buyers are excluded from its application.¹³⁵ Moreover, “obtains” and other verbs relating to buyers are missing from the definition of sex trafficking, leaving no possibility that the human trafficking statute, in its current form, applies to buyers of sex trafficking victims.¹³⁶ Second, the two California statutes most applicable to buyers, the general solicitation law (a.k.a. disorderly conduct)¹³⁷ and the acquiring a prostitute law,¹³⁸ are missing from the list of crimes enumerated in the human trafficking statute.¹³⁹ Third, of all of the enumerated crimes, pandering (a.k.a. prostitution) is the most relevant crime that could possibly apply to buyers because the majority of human trafficking incidents are prostitution of adults or children.¹⁴⁰ However, in *People v. Dixon*,¹⁴¹ a California appellate court explicitly precluded California’s pandering statute from applying to buyers.¹⁴² The pandering statute states that any person who “[p]rocures another person for the purpose of prostitution” is “guilty of pandering.”¹⁴³ The court held that “a person who seeks sex for himself, and uses the money as an inducement, is not a panderer.”¹⁴⁴ It noted, “As to the sexual desires of others, ‘pandering’ means the business of recruiting a prostitute, finding a place of business for a prostitute, or soliciting customers for a prostitute.”¹⁴⁵ This holding precludes application of the human trafficking statute to buyers through a violation of

134. See PENAL § 236.1.

135. See *id.* § 236.1(a).

136. See *id.* § 236.1(b).

137. CAL. PENAL CODE § 647(b) (West 2010).

138. CAL. PENAL CODE § 266e (West 2014).

139. See *id.* § 236.1; statutes cited *supra* note 132.

140. Duren Banks & Tracey Kyckelhahn, *Most Suspected Incidents of Human Trafficking Involved Allegations of Prostitution of an Adult or Child*, BUREAU JUST. STAT. (Apr. 28, 2011), <http://www.bjs.gov/content/pub/press/cshti0810pr.cfm>; see *supra* note 25 (discussing the difference between prostitution and sex trafficking).

141. 119 Cal. Rptr. 3d 901 (Ct. App. 2011).

142. *Id.* at 904.

143. CAL. PENAL CODE § 266i(a) (West 2014).

144. *Dixon*, 119 Cal. Rptr. 3d at 902. This is consistent with the California Supreme Court’s ruling in *People v. Roderigas*, 49 Cal. 9, 11 (1874), which held that a panderer is one “who procures the gratification of the passion of lewdness for another.”

145. *Dixon*, 119 Cal. Rptr. 3d at 904.

the pandering statute. Failing to directly or indirectly include buyers in the human trafficking statute undermines the seriousness of their actions and the role they play in perpetuating sex trafficking.

Under California law, minor victims of sex trafficking do not fare much better than adult victims, and they actually receive less protection than minor victims in practically every other state. Originally, under California's human trafficking statute, minors had to prove force, fraud, or coercion in the commission of sex trafficking to be considered victims,¹⁴⁶ but in 2012, California amended its statute to no longer have additional requirements for minors.¹⁴⁷ Any person less than eighteen years of age is now automatically considered a victim and cannot legally consent to a commercial sex act.¹⁴⁸ This makes the crime of human trafficking similar to statutory rape.¹⁴⁹

146. See KAMALA D. HARRIS, ATT'Y GEN., CAL. DEP'T OF JUSTICE, THE STATE OF HUMAN TRAFFICKING IN CALIFORNIA 2012, at 15–16 (2012), available at <http://oag.ca.gov/sites/all/files/agweb/pdfs/ht/human-trafficking-2012.pdf>. The California Attorney General's report (published before passage of California's 2012 amendments) notes that although federal law defines human trafficking as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age," California law includes no additional provision for minors. *Id.* at 15–16 (emphasis added).

147. A minor for purposes of this statute is any person less than eighteen years of age. CAL. PENAL CODE § 236.1(h)(7) (West 2014).

148. *Id.* § 236.1(e). "Mistake of fact as to the age of a victim of human trafficking who is a minor at the time of the commission of the offense is not a defense . . ." *Id.* § 236.1(f).

149. California's statutory rape statute provides: "Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor." CAL. PENAL CODE § 261.5(a) (West 2014). California's statutory rape statute legally defines a minor as a person less than eighteen years of age, while an adult is a person at least eighteen years of age. *Id.*

Likewise, under California's human trafficking statute,

Any person who causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with the intent to effect or maintain a violation of [various commercial sexual exploitation crimes] is guilty of human trafficking.

Id. § 236.1(c); see statutes cited *supra* note 132. A minor is any person less than eighteen years of age. PENAL § 236.1(h)(7). "Commercial sex act" means sexual conduct on account of which anything of value is given or received by any person. *Id.* § 236.1(h)(2).

Consent or mistake of fact as to the age of the minor victim are not allowed as defenses to criminal prosecution under the human trafficking statute. *Id.* § 236.1(e)–(f).

In determining whether a minor was caused, induced, or persuaded to engage in a commercial sex act, the totality of the circumstances, including the age of the victim, his or her relationship to the trafficker or agents of the trafficker, and any handicap or disability of the victim, shall be considered.

Id. § 236.1(d).

However, the human trafficking and rape laws differ in one significant respect: there is no recourse available against buyers for sex trafficking victims. Both rapists and buyers engage in sex acts with a legally defined victim—albeit one for money (or consideration) and one without—but rape victims are able to prosecute their rapist, while sex trafficking victims are unable to prosecute their buyers.¹⁵⁰ Despite California's 2012 amendments, out of all fifty states, California's sex trafficking laws provide the least protection for minor sex trafficking victims.¹⁵¹ Notably, California is one of only two states that have no laws relating to buyers of minor sex trafficking victims.¹⁵²

2. *California v. Freeman*

California case law plays a significant, even if indirect, role in enabling

150. The federal statute entitled "Enforcement of Statutory Rape Laws," explains that "[i]t is the sense of the Senate that States and local jurisdictions should aggressively enforce statutory rape laws." 42 U.S.C. § 14016(a) (2012). The importance placed on aggressively enforcing statutory rape laws should naturally carry over to minor sex trafficking laws. With both, neither the rape victim nor the sex trafficking victim legally consented to the sex act. The only difference between the two is that money or consideration was exchanged with sex trafficking. The presence of money should be considered beneficial, not detrimental because it would help eliminate some of the problems regarding "he said-she said" in traditional rape cases; with money, the intent to commit the sex act is clear.

151. See 2013 PIC REPORT, *supra* note 28, at 10–13. Shared Hope International, an anti-sex trafficking organization, publishes the annual *Protected Innocence Challenge Report*, which grades the status of each state's laws concerning domestic minor sex trafficking by analyzing each state on the following six categories: (1) "Criminalization of Domestic Minor Sex Trafficking," (2) "Criminal Provisions Addressing Demand," (3) "Criminal Provisions for Traffickers," (4) "Criminal Provisions for Facilitators," (5) "Protective Provisions for the Child Victim," and (6) "Criminal Justice Tools for Investigation and Prosecution." *Id.* at 19. See *id.* at 19–23, for a detailed description of the methodology. Even after passage of the 2012 amendments to California's human trafficking statute, California was one of six states to receive an "F" grade in 2013 and one of four states to receive an "F" grade in 2014. *Id.* at 10–12; SHARED HOPE INT'L, 2014 PROTECTED INNOCENCE CHALLENGE 14 (2014) [hereinafter 2014 PIC REPORT], available at <http://sharedhope.org/wp-content/uploads/2014/11/2014%20Protected%20Innocence%20Challenge%20Report.pdf>. In both 2013 and 2014, California posted the lowest score overall with only 50 total points out of 102.5 possible points and earned the lowest score out of all the states in the category "Criminal Provisions Addressing Demand" with only 4 total points out of 25 possible points. 2013 PIC REPORT, *supra* note 28, at 10–13; 2014 PIC REPORT, *supra*, at 14–17.

152. DEMANDING JUSTICE, *supra* note 15, at 28. Michigan is the other state. *Id.* In 2014, a bill was introduced in the California Senate that would make it a felony to buy sex with a minor less than eighteen years of age. S. 982, 2013 Leg., 2013–2014 Reg. Sess. (Cal. 2014). Passage of this or a similar bill would criminalize buyers of minor sex trafficking victims. *Id.*

sex trafficking. In *California v. Freeman*,¹⁵³ the California Supreme Court became the first state court to effectively legalize the creation of pornography, which, as discussed above, is intrinsically linked to sex trafficking.¹⁵⁴ *Freeman* held that California's pandering statute "was not intended to and does not apply to" a person who pays actors to perform sexually explicit acts in a nonobscene motion picture, a.k.a. pornography.¹⁵⁵ Freeman was charged with multiple counts of pandering for hiring and paying actors to perform in a commercial adult film shot at a private residence.¹⁵⁶ The film portrayed sexually explicit acts including sexual intercourse, oral copulation, and sodomy.¹⁵⁷ Freeman was found guilty after a jury trial, and the California Court of Appeals affirmed the verdict.¹⁵⁸ But, Freeman's conviction was later reversed by the California Supreme Court.¹⁵⁹

In its analysis, the *Freeman* court assumed, for the sake of argument, that the film was nonobscene because there had been no legal determination otherwise.¹⁶⁰ The court first analyzed the language of the pandering statute

153. 758 P.2d 1128 (1988) (in bank). See generally Sarah H. Garb, Note, *Sex for Money is Sex for Money: The Illegality of Pornographic Film as Prostitution*, 13 LAW & INEQ. 281, 290–96 (1995) (analyzing the shortcomings of the court's analysis in *Freeman*).

154. See *supra* Part II.C.

155. 758 P.2d at 1129.

156. *Id.* For the purposes of pandering, it does not matter if the act occurs in a public or private location. See CAL. PENAL CODE § 266i(a)(1) (West 2014). However, once there is a determination that the act was not prostitution, then the location matters because most consensual adult sex acts are legal in private, but not always in public. Compare CAL. PENAL CODE § 314 (West 2014) (criminalizing lewd conduct and indecent exposure in public place), and CAL. PENAL CODE § 647(a) (West 2010) (criminalizing disorderly conduct in public place), with *Lawrence v. Texas*, 539 U.S. 558 (2003) (decriminalizing oral copulation and sodomy between consenting adults in private). But see CAL. PENAL CODE § 285 (West 2014) (criminalizing incest regardless of location); CAL. PENAL CODE § 286.5 (West 2014) (criminalizing sexual assault of an animal regardless of location).

157. *Freeman*, 758 P.2d. at 1129.

158. *Id.*

159. *Id.* at 1135.

160. *Id.* at 1130. The court reiterates the phrase "nonobscene film" throughout the entire *Freeman* opinion. See *id.* at 1129–33. Although the film was not determined to be obscene, obscenity is a value judgment of the acts that were filmed, and many nonobscene acts can still be crimes. See discussion *supra* note 85. The court assumes that because the film was not obscene, "prosecution of [the] defendant under the pandering statute must be viewed as a somewhat transparent attempt at an 'end run' around the First Amendment and the state obscenity laws." *Freeman*, 758 P.2d at 1130. However, this belies the fact, as mentioned later in the opinion, that if a nonobscene crime, such as an actual murder, rape, or robbery, is filmed, the actual underlying crime would not be protected by the First Amendment. See *id.* at 1133.

Accordingly, whether the film was obscene or not should have no bearing on the

under which the defendant was charged.¹⁶¹ The relevant text states, “Any person who . . . [p]rocures another person for the purpose of prostitution” is “guilty of pandering.”¹⁶² The court accurately pointed out that, although “prostitution” is not defined in the pandering statute, a different section of California’s Penal Code defines “prostitution” as “any lewd act between persons for money or other consideration.”¹⁶³ Next, the court looked to two previous California cases to determine the definition of “lewd.”¹⁶⁴ First, in *Pryor v. Municipal Court*,¹⁶⁵ the California Supreme Court defined “lewd” for the purposes of another section of California’s Penal Code as an act that requires “touching of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance or offense.”¹⁶⁶ Second, in *People v. Hill*,¹⁶⁷ a California appellate court applied this definition to prostitution.¹⁶⁸ The sentence from *Hill* that the *Freeman* court relies on clarified how the definition of lewd in *Pryor* applied to the specific facts in *Hill*: “[For] a ‘lewd’ or ‘dissolute’ act to constitute ‘prostitution,’ the genitals, buttocks, or female breast, of either the prostitute or the customer must come in contact with some part of the body of the other for the purpose of sexual arousal or gratification of the customer or of the prostitute.”¹⁶⁹ In *Freeman*, the California Supreme Court found it “unnecessary” to address the contention

determination of whether the act, which happened to be filmed, was a crime, especially when the crime has no obscenity requirement. Here, California’s pandering statute has no such obscenity requirement, and thus, the nonobscenity determination should have no bearing on the determination of whether the underlying act was a crime. See PENAL § 266i(a)(1).

161. *Freeman*, 758 P.2d at 1130–31.

162. PENAL § 266i(a)(1); see *Freeman*, 758 P.2d at 1130.

163. *Freeman*, 758 P.2d at 1130 (emphasis omitted) (quoting CAL. PENAL CODE § 647(b) (West 2010) (criminalizing disorderly conduct)). Notably, the definition of prostitution is an act between persons and makes no mention of whom the persons must be. See PENAL § 647(b).

164. *Freeman*, 758 P.2d at 1130.

165. 599 P.2d 636 (Cal. 1979).

166. *Id.* at 647.

167. 163 Cal. Rptr. 99 (App. Ct. 1980).

168. *Id.* at 105.

169. *Freeman*, 758 P.2d at 1130 (emphasis omitted) (quoting *Hill*, 163 Cal. Rptr. at 105). Although *Hill* was not binding precedent, the *Freeman* court misstates its reliance on *Hill* because the *Freeman* court did not accurately use *Hill*’s definition of “lewd.” What *Freeman* fails to mention is that *Hill* actually “construe[d] the term ‘prostitution,’ as used in Penal Code sections 266h and 266i, as meaning *sexual intercourse between persons for money or other considerations* and only those ‘lewd or dissolute’ acts between persons for money or other consideration as set forth in the *Pryor* case.” *Hill*, 163 Cal. Rptr. at 105 (emphasis added). Under *Hill*, prostitution includes sexual intercourse that is not lewd (i.e., does not require sexual arousal or gratification). See *id.*

that pandering requires sexual contact to be with the customer.¹⁷⁰ The court concluded, “[I]n order [for a lewd act] to constitute prostitution, the money or other consideration must be paid *for the purpose of sexual arousal or gratification*.”¹⁷¹

Applying this definition to the facts in *Freeman*, the court found no evidence that Freeman paid acting fees “for the purpose of [his] sexual

170. *Freeman*, 758 P.2d at 1131. If *Freeman* had actually adopted the definition of prostitution as stated in *Hill*, there would be no question over whether prostitution requires that the customer receive sexual contact; the sexual intercourse between the actors in *Freeman* would be enough to constitute prostitution. See *id.* at 1130–31; discussion *supra* note 169. But because *Freeman* focused on only the latter half of *Hill*’s definition of prostitution, it has created difficulties in determining whether “lewd”—and thus prostitution—requires the sexual contact to be with the customer (i.e., the person who pays the consideration) or if contact with a third party can count. See *Freeman*, 758 P.2d at 1134–35. Even though the application of the definition of “lewd” (the definition *Freeman* focuses on) in *Hill* specifies a customer, *Freeman* “[found] it unnecessary to address that contention” and instead focused its attention on the “clear” part of the definition, which specifies that for prostitution “the money or other consideration must be paid *for the purpose of sexual arousal or gratification*.” *Id.* at 1131. *Freeman* specifically declined to adopt the position that prostitution must be with a customer. *Id.*

The ambiguity of whether “lewd” requires a customer has come up in other California cases. For example, in *Wooten v. Superior Court*, 113 Cal. Rptr. 2d 195, 206 (Ct. App. 2001), the California court of appeal held that a customer’s observation of sexual conduct between two dancers (in exchange for consideration) does not constitute a lewd act for purposes of prostitution. It cited *Hill* for the definition that prostitution requires “bodily contact between the prostitute and the customer.” *Id.* at 201 (citing *Hill*, 163 Cal. Rptr. at 105). The *Wooten* court acknowledged that although *Freeman* had withheld from addressing whether sexual contact must be between the prostitute and customer, the *Freeman* court had adopted *Hill*’s definition of “lewd.” *Id.* at 203. *Wooten* stated that because “lewd” was ambiguous and the definition of prostitution is susceptible to different definitions, the rule of lenity applies giving the defendant the most favorable interpretation. *Id.* at 200, 203. As a result, the *Wooten* court had to assume that for a lewd act to constitute prostitution, there must be sexual contact between a customer and a prostitute—which did not occur in *Wooten*. See *id.* at 197. The dissent in *Wooten* argues that the legislature broadly defined prostitution without defining whom the persons must be, and thus, “*Hill* could not create an ambiguity that was not already in the statute.” *Id.* at 208, 210 (Richli, Acting P.J., dissenting).

Wooten reveals the problems that have arisen from an ambiguous definition of prostitution by the legislature. See *id.* at 195 (majority opinion). According to *Wooten*, prostitution only occurs when there is sexual contact between the prostitute and the customer. *Id.* at 201. The court in *Wooten* does not specify whether a customer is the person who pays money, the person who receives the benefit of the services paid for, or both. See *id.* at 198–207. If being a customer requires that the person pay money, then when a third party pays for a prostitute X to have sexual contact with Y, there is no prostitution. This would create an easy runaround of the pandering statute. On the other hand, if being a customer merely requires sexual contact, this can pose problems in identifying the customer when a third party pays for a prostitute X to have sexual contact with Y, but Y is unaware of the transaction. Under *Wooten*, if Y is not a customer, the act cannot be prostitution. See *id.* at 201.

171. *Freeman*, 758 P.2d at 1131.

arousal or gratification” or that of the actors.¹⁷² The court specified that Freeman did not participate in the sexual conduct.¹⁷³ Accordingly, the court held that Freeman did not engage in the “requisite conduct” or have the “requisite mens rea or purpose” to be guilty of pandering.¹⁷⁴

The court failed to analyze this issue in depth in its single, conclusory analysis paragraph.¹⁷⁵ It appears that the court assumed that a person cannot receive sexual arousal or gratification by watching others engage in sexual conduct.¹⁷⁶ The entire premise of pornography, however, is that people can and do receive sexual arousal or gratification from watching others engage in various sex acts.¹⁷⁷ Next, the court specified that Freeman—“the payor”—did not engage in the requisite sexual conduct for pandering.¹⁷⁸ But one paragraph earlier the court stated that it was not addressing whether the sexual conduct had to involve the customer.¹⁷⁹ There is no dispute that sexual conduct, in the form of sexual intercourse, oral copulation, and sodomy, occurred between the actors.¹⁸⁰ Thus, the requisite lewd contact of “the genitals, buttocks, or female breast . . . com[ing] in contact with some part of the body of the other” did occur, which is sufficient to satisfy the sexual contact requirement of pandering.¹⁸¹ Contrary to its prior statement, it

172. *Id.* at 1130–31.

173. *Id.* at 1131. The court fails to explain how an adult film, which is created with the purpose of selling to others for their sexual arousal or gratification, does not satisfy the required pandering element of “for the purpose of sexual arousal or gratification.” *Id.* Money was paid to film the actors engaging in sex acts so that, at a minimum, those who buy the film in the future would be sexually aroused or gratified. *Id.* at 1129. If the court thinks that the sexual arousal or gratification of someone watching the film at a later time is too far removed from the act, it fails to specify this rationale. *See id.* at 1131. *But see* State v. Taylor, 808 P.2d 314, 318 (Ariz. Ct. App. 1990) (explaining that *Taylor* was distinguishable from *Freeman* because *Freeman* involved a film that distanced the future observer “temporally and physically from the performers”).

174. *Freeman*, 758 P.2d. at 1131.

175. *See id.*

176. *See id.*

177. The United States Department of Justice recognizes that the point of pornography is “to stoke the fires of sexual desire.” GELBER, *supra* note 66, at 4; *see also Porn FAQs*, *supra* note 110 (follow “What is the Definition of Pornography and What is the Porn Industry?” hyperlink) (discussing how pornography by definition is a depiction of erotic behavior where “erotic” means “devoted to, or tending to arouse sexual love or desire”).

178. *Freeman*, 758 P.2d. at 1131.

179. *Id.*

180. *Id.* at 1129.

181. *Id.* at 1130 (quoting *People v. Hill*, 163 Cal. Rptr. 99, 105 (Ct. App. 1980)). If the court had adopted *Hill*’s actual definition then there would be no issue because when intercourse occurs,

appears that the court *does* take into consideration that the customer, Freeman, was not engaged in the sexual contact.¹⁸² Otherwise the court cannot justify its specification that Freeman did not engage in the “requisite conduct.”¹⁸³

Second, the court’s analysis addressed First Amendment considerations.¹⁸⁴ The court stated that applying California’s pandering statute to the hiring of actors to perform in a nonobscene motion picture would impinge upon First Amendment freedoms.¹⁸⁵ The court mentions the *O’Brien* factors, which are used to determine the constitutional propriety of governmental regulation of “conduct” that also contains “speech” elements:

(1) [W]hether the regulation is within the constitutional power of the government, (2) whether the governmental interest is important or substantial, (3) whether the governmental interest is unrelated to the suppression of free expression, and (4) whether the incidental restrictions on alleged First Amendment interests is no greater than is essential to the furtherance of the interest.¹⁸⁶

The court concluded, without much elaboration on the specific factors, that applying the pandering statute to pornography would “clearly run afoul of the requirement that the governmental interest be unrelated to the suppression of free expression.”¹⁸⁷ It summarily dismissed the government’s

sexual pleasure or gratification is not required. *See* discussion *supra* notes 169–70.

182. *See Freeman*, 728 P.2d at 1131.

183. *See id.*

184. *See id.* at 1131–35.

185. *Id.* at 1131. The premise the court starts with is that “a nonobscene motion picture is protected by the guarantee of free expression found in the First Amendment.” *Id.* It moves to the conclusion that because the acts involved were not legally determined obscene, “they are within the protection of the First Amendment.” *Id.* at 1132. This reasoning conflates a motion picture with the underlying acts that were filmed; although the acts are not obscene, they may still not be protected by the First Amendment. *Cf. Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251 (2002) (explaining that the First Amendment does not protect the act of how child pornography is made).

186. *Freeman*, 758 P.2d at 1132 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

187. *Id.* Besides this conclusory statement, the court failed to analyze these factors individually. *Id.* To address any First Amendment considerations, each factor should be analyzed individually. The first *O’Brien* factor is “whether the regulation is within the constitutional power of the government.” *Id.* Here, the regulation in question is pandering, and prostitution has historically been accepted as under the constitutional power of the government as evidenced by the prohibitions against prostitution in every state, including California. *See, e.g., CAL. PENAL CODE* § 266i (West 2014). *Freeman* does not contest that pandering is outside the constitutional power of the

interests in public health and in preventing profiteering from prostitution.¹⁸⁸ The court stated that “the self-evident purpose of the prosecuting authority in bringing these charges was to prevent profiteering in pornography without the necessity of proving obscenity.”¹⁸⁹

The court mentions, “The fact that the People concede that a film identical to that in this case could be made lawfully if the performers were not paid also belies the asserted ‘public health’ interest.”¹⁹⁰ However, the People’s concession is necessary because if the actors were not paid, the element of pandering requiring payment or consideration would not be met.¹⁹¹ This concession in no way undermines, and in fact strengthens, the

government. *See* 758 P.2d at 1121–35.

The second factor is “whether the governmental interest is important or substantial.” *Id.* at 1132. California case law explains that the government has a substantial interest in discouraging, limiting, and prohibiting prostitution. *See, e.g.,* *People v. Maita*, 203 Cal. Rptr. 685, 688 (Ct. App. 1984) (“The pimping and pandering laws are aimed at discouraging prostitution by prohibiting third parties from expanding an existing prostitute’s operation or expanding the supply of available prostitutes. The government has a substantial interest in limiting prostitution and its related commercial endeavors of pimping and pandering.” (citations omitted)); *People v. Hashimoto*, 126 Cal. Rptr. 848, 850 (Ct. App. 1976) (“The pandering statute and Penal Code section 266h (pimping) are both designed to discourage prostitution by discouraging persons other than the prostitute from augmenting and expanding a prostitute’s operation, or increasing the supply of available prostitutes.”). Besides this substantial interest, the government also has interests in public health concerns resulting from pandering. *See infra* text accompanying notes 188–93. The public health concern specific to pandering articulated by the People was preventing the spread of sexually transmitted diseases, including AIDS. *Freeman*, 758 P.2d at 1132.

The third factor is “whether the governmental interest is unrelated to the suppression of free expression.” *Id.* at 1132. The commercial and health interests cited above are unrelated to suppressing free expression.

The fourth factor is “whether the incidental restrictions on alleged First Amendment interests is no greater than is essential to the furtherance of the interest.” *Freeman*, 758 P.2d at 1132. The interest under First Amendment protection claimed in *Freeman* is a nonobscene motion picture. *Id.* at 1131. Assuming that Freeman’s conduct constitutes prostitution, Freeman violated a criminal statute, and the filming of that crime, as the court noted, should not act as a shield for his actions. *See id.* at 1133. However, the People did not say Freeman could not film or distribute the film or profit from the film—all of which would raise First Amendment interests. *See id.* at 1133–34. In fact, Freeman could likely still distribute and profit from the film even with a pandering conviction. *See id.* While being punished or threatened with punishment would certainly discourage his filming (which is legally allowed), that is a minor, incidental effect and not greater than necessary to punish the underlying criminal acts. *See id.*

188. *Freeman*, 758 P.2d at 1132.

189. *Id.* at 1132–33 (emphasis omitted).

190. *Id.* at 1133.

191. *See* PENAL § 266i(a)(1).

People's first interest in preventing profiteering from prostitution.¹⁹² Moreover, the court does not, and cannot, infer that because the government does not regulate *all* sexual acts, it is unconcerned about "public health."¹⁹³ The People's concession further belies the court's contention that the government's purpose was to prevent profiteering in pornography rather than prostitution. The profiting from pornography occurs from selling the films, not making the films.¹⁹⁴ The People agreed that if no money was paid, the film and future profits would not be governed by the pandering statute.¹⁹⁵ The People were not trying to prohibit Freeman from selling his "nonobscene film"; they just wanted to punish the underlying criminal act, which is the People's prerogative.¹⁹⁶

Next, although the court dismissed the People's reliance on several cases as misplaced by ignoring and even overturning precedent,¹⁹⁷ it agreed with the case law summary that:

The fact that a motion picture of an actual murder, rape or robbery in progress may be exhibited as a news film or a full length movie without violating the law does not mean that one could with impunity hire another to commit such a crime simply because the

192. See *Freeman*, 758 P.2d at 1132; discussion *supra* note 187.

193. This goes back to the government's interest in regulating the *commercial* aspect of various sex acts and the health concerns related to those transactions. See discussion *supra* note 187.

194. Making a film takes both time and money to purchase equipment, pay the actors, and produce the film.

195. *Freeman*, 758 P.2d at 1133.

196. See *id.* at 1133–34.

197. The *Freeman* court finds fault with five cases that the government relies on: *People v. Fixler*, 128 Cal. Rptr. 363 (Ct. App. 1976); *People v. Kovner*, 409 N.Y.S.2d 349 (Sup. Ct. 1978); *People v. Maita*, 203 Cal. Rptr. 685 (Ct. App. 1984); *Oregon v. Kravitz*, 511 P.2d 844 (Or. App. Ct. 1973); and *United States v. Roeder*, 526 F.2d 736 (10th Cir. 1975). *Freeman*, 758 P.2d at 1133–35. *Freeman* stated that the *Fixler* court ignored the First Amendment and, as such, misplaced its analysis. *Id.* at 1133. *Freeman* held,

To the extent that *People v. Fixler* . . . h[e]ld that the payment of wages to an actor or model who performs a sexual act in filming or photographing for publication constitutes prostitution regardless of the obscenity of the film or publication so as to support a prosecution for pandering under section 266i, [it is] disapproved.

Id. at 1133 n.6. Next, *Freeman* dismissed the *Kovner* and *Maita* courts' conclusions because they relied on *Fixler*. *Id.* *Freeman* distinguished *Maita* and *Kravitz*, because in those cases members of the audience, a.k.a. customers, engaged in sexual conduct. *Id.* However, the fact that the customer engaged in sexual contact should not be dispositive because *Freeman* did not decide whether it was necessary for the sexual contact to be with a customer or not. See *id.* at 1130–31.

primary motivation was to capture the crime on film¹⁹⁸

The *Freeman* court stated, “Undeniably, one cannot lawfully hire another to commit murder, rape or robbery for the purpose of photographing the act. . . . [These] crimes [are] independent of and totally apart from any payment for the right to photograph the conduct.”¹⁹⁹

As the court mentioned, if a murder, rape, or robbery is watched, photographed, or filmed, the underlying act is still a murder, rape, or robbery.²⁰⁰ Likewise, if prostitution is watched, photographed, or filmed, it is still prostitution.²⁰¹ The presence of a third party or technology to document the act does not change the nature of the act being observed.²⁰² The real issue in *Freeman* is whether the fees paid to film performers engaging in sexual acts constitute “money or other consideration” for the purposes of prostitution.²⁰³

The court reasoned that Freeman’s acts “were not crimes independent of and apart from payment for the right to photograph the performance. The [lower court’s] determination that pandering and prostitution occurred [in *Freeman*] was entirely dependent on the payment for the right to photograph.”²⁰⁴ The *Freeman* court held that the acting fees were payment for the right to “photograph the performance.”²⁰⁵ But the right to photograph is not contingent on fees being paid; pandering, however, is contingent on

198. *Freeman*, 758 P.2d at 1133 (quoting *Fixler*, 128 Cal. Rptr. at 365–66).

199. *Id.* at 1133–34.

200. *Id.* at 1134.

201. The court does not deny this fact; it just denies that the elements of prostitution were met in *Freeman*. *See id.*

202. *See id.* at 1133–34.

203. CAL. PENAL CODE § 647(b) (West 2010). Murder, rape, and robbery do not have a monetary element. *See* CAL. PENAL CODE § 187 (West 2014) (murder); CAL. PENAL CODE (West 2014) (rape); CAL. PENAL CODE § 211 (West 2014) (robbery). Thus, the issue in *Freeman* hinges on whether the monetary element of pandering makes *Freeman* distinguishable from the hypothetical given by the court. *See Freeman*, 758 P.2d at 1134. This begs the question whether the distinction could be a runaround to the pandering statute. Is a commercial sex act never pandering if it is filmed? Does it matter whether the subjective intent of the person paying was for the right to photograph, film, or just prostitute a person? If prostitution is filmed, is it then immune from the pandering statute? Pornography created for consideration is essentially just documented prostitution parading as “freedom of expression.” *See* discussion *supra* note 170.

204. *Freeman*, 758 P.2d at 1134.

205. *Id.* The “performance” referred to here is sexually explicit acts, including sexual intercourse, oral copulation, and sodomy. *Id.* at 1129.

money or other consideration being paid.²⁰⁶ The People did not say Freeman could not photograph; in fact, they conceded that if no fees were paid, the acts would be legal and the “right to photograph” would still exist.²⁰⁷ Actors are paid to act. Here, the actors performed sex acts, and thus were paid for those sex acts.²⁰⁸ Because the money paid can be considered payment for the sexual acts—albeit acts that were filmed—it satisfies *Freeman*’s definition of pandering: “procures another person for the purpose of prostitution,” where “‘prostitution’ includes any lewd act between persons *for money or other consideration*.”²⁰⁹ Freeman used the First Amendment as a runaround and shield for otherwise criminal acts, and the California Supreme Court condoned his actions.²¹⁰

IV. DEMANDING THAT CALIFORNIA ADDRESS DEMAND

A. *Following Freeman*

Freeman had further-reaching implications than just the reversal of Freeman’s conviction.²¹¹ When the *Freeman* court failed to apply the pandering statute to pornography, it placed California in a unique position regarding pornography because *Freeman*’s holding effectively legalized the porn industry in California.²¹² As a result, the modern porn industry was born in California’s San Fernando Valley, located near Hollywood and Los Angeles.²¹³ The California Supreme Court’s impact reached further than just

206. PENAL § 647.

207. *See Freeman*, 758 P.2d at 1134.

208. *See id.* at 1129.

209. *Id.* at 1130 (emphasis omitted) (quoting CAL. PENAL CODE § 266i(a)(1) (West 2010); *id.* § 647(b)).

210. *See id.* at 1129.

211. *See id.* at 1135.

212. *Id.* Pornography is only legal in California through case law, not statute, and if the California legislature were to amend the pandering statute to explicitly include pornography, *Freeman* would be superseded. *See infra* Part V.B.

213. *See generally* Chauntelle Anne Tibbals, *When Law Moves Quicker Than Culture: Key Jurisprudential Regulations Shaping the US Adult Content Production Industry*, 15 SCHOLAR 213, 225–27 (2013) (discussing how *Freeman* “set the stage for unprecedented legal growth and development” of the adult content production industry). An estimated 90% of porn films were made in Los Angeles County. CBS News Staff, *Condom Law Takes Effect for Los Angeles Porn Actors*, CBS NEWS (Mar. 5, 2012), <http://www.cbsnews.com/news/condom-law-takes-effect-for-los-angeles-porn-actors/>. However, that number has decreased after the passage of L.A. County’s “Condom

California because *Freeman*'s holding and rationale were adopted by New Hampshire—the only other state to legalize pornography.²¹⁴ Through both the protection *Freeman* provides for the porn industry in California and the persuasive authority it provides for similar cases in other states, *Freeman* has allowed pornography to thrive, fuel the selfish desires of buyers, and create demand for sex trafficking.²¹⁵ “Sex for money is sex for money.”²¹⁶ But in *Freeman*—instead of drawing a bright line—the California Supreme Court blurred the lines of California's pandering statute.

B. *Why Address Demand?*

The United States Department of Justice explained, “We cannot combat the sexual exploitation of children if the possessors, the viewers, the receivers, and the distributors are not held accountable for their contribution

Law,” which requires that “actors in adult movies in the city must use condoms in order for producers to get a filming permit.” *Id.* Although producers of about 60% of the porn industry have migrated to Las Vegas where people are more accepting of their work, the fate of the porn industry is far from certain. Susan Abram, *Porn Industry Admits Mistakes in Condom Law Campaign*, HUFFINGTON POST (Jan. 24, 2014, 4:03 PM), http://www.huffingtonpost.com/2014/01/25/porn-industry-condom-law_n_4659342.html. Las Vegas does not have the legal protection that *Freeman* has provided to producers in California. *Id.* The porn producers admit the move is dangerous and fear future government intervention, especially if it “become[s] an issue at the federal level.” *Id.* In response to the passage of the Condom Law, the porn producers took their fight to the courts, claiming that the law is unconstitutional under the First Amendment. Ruben Vives, *Porn Industry Suffers Setback with Judge's Ruling on Condom Law*, L.A. TIMES, Aug. 17, 2013, <http://www.latimes.com/local/lanow/la-me-ln-porn-industry-condom-20130817,0,6000686.story#axzz2rRhPoQzZ>. However, the case was dismissed because the Condom Law “seeks to alleviate those harmed [by the health risks that the measure is targeting] in a direct and material way.” *Id.* But see Elizabeth Sbardellati, Comment, *Skin Flicks Without the Skin: Why Government Mandated Condom Use in Adult Films is a Violation of the First Amendment*, 9 NW. J.L. & SOC. POL'Y 138 (2013) (arguing that the Condom Law fails to meet the *O'Brien* standard and thus violates the First Amendment). The porn producers say other efforts will likely be taken, such as measures to appeal the Los Angeles law. Associated Press, *Porn Industry Says Viva Las Vegas After California Condom Law*, CBS SACRAMENTO (Jan. 17, 2014), <http://sacramento.cbslocal.com/2014/01/17/porn-industry-says-viva-las-vegas-after-california-condom-law/>.

214. See *New Hampshire v. Theriault*, 960 A.2d 687 (N.H. 2008) (citing *Freeman* and holding that the New Hampshire prostitution statute was overbroad as applied to pornography). But see *People v. Kovner*, 409 N.Y.S.2d 349 (Sup. Ct. 1978) (holding that pornography, specifically the hiring of actors and actresses for the purpose of engaging in filmed sexual conduct, constitutes prostitution).

215. See, e.g., discussion *supra* notes 213–14; Patrick Trueman, Op-Ed., *Porn Creates Demand for Sex Trafficking*, MIAMI HERALD, July 23, 2014, <http://www.miamiherald.com/opinion/op-ed/article1976789.html>.

216. See Garb, *supra* note 153, at 296.

to the problem.”²¹⁷ Likewise, California cannot combat the sexual exploitation of sex trafficking victims if buyers are not held accountable for their contribution to the problem.²¹⁸ It is time for California law to recognize the harm and discrimination that is perpetuated by the demand for sex trafficking victims.²¹⁹ The demand for sex trafficking may be considered a public health problem because it affects the entire community.²²⁰ Public health problems can best be solved by changing the environment that creates them.²²¹ One way to change the environment is to change the laws.²²² Because sex trafficking is fueled by demand, if California wants to effectively combat sex trafficking, it needs to adequately address demand through its laws.

V. DRAWING A BRIGHT LINE

A. *Criminalizing Buyers Under California’s Human Trafficking Statute*

One way California can address demand is by criminalizing the buying of sex trafficking victims. Laws punishing buyers would act as a deterrent to potential buyers.²²³ In the past, the social stigma attached to visiting a prostitute or viewing pornography functioned as a deterrent; but now, because society has adopted a sexualized popular culture that has normalized

217. GELBER, *supra* note 66, at 17.

218. *See id.*

219. Many scholars conclude that legalizing prostitution fails to adequately combat sex trafficking because legalizing prostitution merely allows the government to assume the pimp’s role by collecting taxes. *See, e.g., Prostitution, Trafficking, and Cultural Amnesia, supra* note 35, at 137. Others argue that legalizing prostitution will allow the government to regulate the industry, which will lead to enforced health standards and HIV prevention. *See, e.g., id.* at 138; *see also* Msnbc.com Staff, *Ontario, Canada Greenlights Brothels*, NBC NEWS (Mar. 26, 2012, 9:21 AM), http://worldnews.nbcnews.com/_news/2012/03/26/10869813-ontario-canada-greenlights-brothels (legalizing brothels in an attempt to make prostitution less dangerous for sex workers). However, even with legalization, prostitution will continue to reinforce and promote sex inequality, because if the harms of sex trafficking “are intrinsic to prostitution, just as slavery’s harms are intrinsic to that institution, then we must ultimately prevent the existence of prostitution.” *Prostitution, Trafficking, and Cultural Amnesia, supra* note 35, at 139, 143.

220. *See supra* note 44 and accompanying text.

221. *See supra* notes 64–70 and accompanying text.

222. *See supra* notes 71–77 and accompanying text.

223. *See Why Trafficking Exists, supra* note 34.

a tolerance for commercial sex acts, a new deterrent is needed.²²⁴ A statute criminalizing and punishing buyers is likely the most effective way to deter buyers for their part in sex trafficking.²²⁵ As with most actions, potential buyers will weigh the possible consequences of their actions against the perceived benefits. Thus, the higher the cost of commercial sex acts with a sex trafficking victim, the more adequate the deterrence. Legal punishment for buyers of sex trafficking victims will discourage buyers from buying. If there is less demand for commercial sex acts, then there will be less supply needed and fewer sex trafficking victims.²²⁶ In addition, criminalizing buyers promotes sex equality.²²⁷ Having laws in place that reflect the disapproval of buyers' conduct will send the message that it is not acceptable for society to use women and children, without regard to their status as victims, as objects, and as a means of satisfying another's sexual desires.²²⁸ Criminalizing the buying of sex trafficking victims will also allow victims to seek recourse and retribution for the wrongs they suffered in their exploitation.

The current state of California law inadequately protects sex trafficking victims.²²⁹ Although California law allows retribution by rape victims against their attackers, its human trafficking law provides human trafficking victims no such recourse.²³⁰ The only difference between a rapist and a buyer is that a buyer often goes through a third party and pays money (or other consideration).²³¹ This does not change the underlying fact that the person being taken advantage of sexually is legally a victim and the buyer is guilty of exploitation.²³²

The easiest way for California to criminalize buyers is to incorporate

224. See *supra* notes 64–70 and accompanying text.

225. See *supra* note 63 and accompanying text.

226. See *supra* notes 57–61 and accompanying text.

227. See MacKinnon, *supra* note 37, at 1006–08.

228. This message may have further reaching implications that not only deal with the perceptions of sex trafficking victims, but also all relationships with women. See *supra* note 111 and accompanying text.

229. See discussion *supra* Part III.B.

230. Compare CAL. PENAL CODE § 236.1 (West 2014) (human trafficking), with CAL. PENAL CODE § 261.5(a) (West 2014) (statutory rape).

231. See *supra* note 150 and accompanying text.

232. See *supra* note 150 and accompanying text. Notably, the exchange of money is likely more verifiable than “he said, she said” in a typical rape case.

specific language that applies to buyers into its human trafficking statute.²³³ There is no language currently in California's human trafficking statute that explicitly applies to buyers.²³⁴ Unlike the Eighth Circuit's application of the TVPA to buyers in *Jungers*, under California's case law, the pandering statute does not apply to buyers and a California court would likely hold buyers outside the scope of the state's human trafficking statute.²³⁵ As the law stands, California has left the door open for another blurred-line ruling, like *Freeman*, that would effectively legalize the actions of buyers. Thus, in order to ensure that the human trafficking statute applies to buyers, the legislature can either clarify that its intent was for an existing word in the human trafficking statute, such as "obtains" in the labor trafficking context, to apply to buyers, or add words to the human trafficking statute that directly apply to buyers, such as "solicits" and "patronizes."²³⁶ The addition of California state laws that criminalize buyers will increase the ability of law enforcement to prosecute buyers and more adequately protect sex trafficking victims.²³⁷

B. Addressing Pornography by Clarifying California's Pandering Statute

Criminalizing buyers of sex trafficking victims is a start to fighting demand, but California can do more. Addressing a commercial sex act retroactively can only do so much to deter potential buyers.²³⁸ Punishing buyers after an act has occurred does not avoid the consequences that the sex

233. See, e.g., End Sex Trafficking Act, *supra* note 125. The Swedish model is the most well-known method for punishing buyers while protecting sex trafficking victims. See Janice Raymond, Op-Ed., *Sex for Sale: Why Sweden Punishes Buyers*, CHRISTIAN SCI. MONITOR, Sept. 7, 2010, <http://www.csmonitor.com/Commentary/Opinion/2010/0907/Sex-for-sale-Why-Sweden-punishes-buyers>. See generally *Swedish Law on Prostitution*, PROSTITUTION RESEARCH & EDUC. (2013), <http://prostitutionresearch.com/topic/swedish-law-on-prostitution/> (providing various articles on the Swedish model). But see Berger, *supra* note 62, at 548–50 (criticizing the Swedish model).

234. See PENAL § 236.1.

235. See CALIFORNIA REPORT CARD 2013, *supra* note 133.

236. "Solicits" and "patronizes" are the words the federal "End Sex Trafficking Act of 2013" bill uses to amend the TVPA to explicitly apply to buyers. End Sex Trafficking Act, *supra* note 125.

237. DEMAND, *supra* note 33, at 146 (advocating that all anti-trafficking laws should contain provisions that criminalize demand, as well as authorize "funding for demand prevention activities"). For example, passage of the End Sex Trafficking Act or a similar act that criminalized buyers would allow both federal and state options for prosecution of sex trafficking. See *supra* notes 125–27 and accompanying text.

238. See *Why Trafficking Exists*, *supra* note 34.

trafficking victim experiences: once a person becomes a victim of sex trafficking, the damage is already done.²³⁹ Accordingly, to better protect sex trafficking victims and gain ground in the fight against the sex trafficking industry, it is necessary to be proactive, not just reactive. Addressing the root causes, or the factors that help fuel and create the demand for sex trafficking, will allow California to more adequately fight demand and deter more potential buyers.²⁴⁰

One of the major factors creating demand for sex trafficking is pornography.²⁴¹ The pornography industry both enslaves sex trafficking victims and helps create demand to buy sex trafficking victims for other sexual acts.²⁴² It is time that California recognize the role its statutes and case law play in enabling the porn industry to engage in sex trafficking and create demand for sex trafficking.

California is in a unique position to impact pornography and, by association, the sex trafficking industry around the world.²⁴³ Because California was the first and is one of only two states where pornography is protected legally, the majority of the pornography produced comes from California.²⁴⁴ In *Freeman*, the California Supreme Court held that the

239. Sex trafficking victims have untold physical and psychological harm. *See id.* The consequences may include STDs, video or photographic documentation in the case of pornography, and PTSD. *See supra* notes 39–44 and accompanying text. Trafficking victims must live with what happened to them the rest of their lives. It takes more resources to catch the trafficker or buyer, try to rescue a victim, and then provide rehabilitation services than to prevent the trafficking in the first place. *Cf.* Alfonso E. Lenhardt, *The Economics of Prevention: Reducing Costs and Crime*, POLICE CHIEF, July 2006, available at http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=928&issue_id=72006 (explaining “the overall impact of crime and the benefits of prevention,” such as saving money).

240. Although the rescue and rehabilitation of sex trafficking victims is important, a new approach is needed that deals with the root causes and both the cultural and legal acceptance of the human trafficking industry. *See* Harry Leibowitz, *How Do We Stop the World's Sex Trafficking Problem?*, HUFFINGTON POST (Dec. 13, 2013, 10:00 AM), http://www.huffingtonpost.com/harry-leibowitz/how-do-we-stop-the-worlds_b_4433765.html (advocating beginning an annual global conference—similar to the annual HIV/AIDS conference—on child sex trafficking to help mitigate the underlying causes and create discussion of the legal and cultural factors that promote and support the sexual exploitation of children).

241. *See supra* Part II.C.

242. *See supra* text accompanying notes 88–90.

243. California would only impact commercial pornography production because any pornography that is produced without money or consideration would be outside the reach of the law (unless it violates another criminal statute). *See* CAL. PENAL CODE § 266i (West 2014).

244. *See* discussion *supra* notes 212–13. Although there has been a significant decrease in the amount of pornography produced in California after the passage of the Condom Law, pornography is

commercial production of pornography is not prostitution and, as a result, not punishable under California's pandering statute.²⁴⁵ *Freeman* can be overruled by legislative action.²⁴⁶ Specifically, the California legislature can amend the pandering statute to expressly include commercial pornography production as a type of prostitution.²⁴⁷ The legislative intent and the definition of prostitution should be clarified by amending the current pandering statute in two key ways.²⁴⁸

First, the new definition of pandering should explain that the required sexual contact does not have to be with the customer.²⁴⁹ This bright line—

still being produced. See Abram, *supra* note 213. This decrease should in no way diminish the importance of California addressing pornography. The majority of the pornography industry could very easily return to the San Fernando Valley because it is unclear whether Las Vegas will protect the pornography industry as California has done since *Freeman*, or whether the Los Angeles County Condom Law will be repealed after the efforts of the porn producers. See *id.*; Associated Press, *supra* note 213.

Moreover, even if California changes its laws regarding pornography and the industry moves, that is an insufficient reason not to clarify the existing laws. The only difference in that case would be that the overall impact California law would have on pornography production would be diminished—though the impact would likely still be significant. If California takes the lead in addressing its pornography laws, then other states may be encouraged to do likewise. Cf. State v. Theriault, 960 A.2d 687 (N.H. 2008) (relying on California's holding in *Freeman* to legalize pornography production in New Hampshire).

245. See *infra* Part III.B.2.

246. *Freeman* states, "It is the duty of this court in construing a statute to ascertain and give effect to the intent of the Legislature." People v. Freeman, 758 P.2d 1128, 1131 (Cal. 1988) (in bank). However, the court found the legislative intent unclear regarding the definitions of "prostitution" and "lewd," as well as whether the pandering statutes apply to pornography. See *id.* at 1130–31.

247. Only pornography that meets the elements of prostitution (i.e., for money or other consideration) would be affected. See PENAL § 266i. What happens to the pornographic film itself and whether it can be distributed is a different issue that involves the First Amendment, and one that is not addressed in this Comment.

248. See Pryor v. Mun. Ct., 599 P.2d 636, 644 (Cal. 1979) (explaining that because of the ambiguity of the term "lewd" in section 647(a) of the California Penal Code, "[s]uch uneven application of the law is the natural consequence of a statute which as judicially construed measure[s] the criminality of conduct by community or even individual notions of what is distasteful behavior").

249. See discussion *supra* note 170. In Arizona, prostitution does not require sexual contact with the customer; the statutory language is broad enough to encompass customers who engage only as voyeurs. State v. Taylor, 808 P.2d 314, 316 (Ariz. Ct. App. 1990). Specifically,

Arizona defines "prostitution" as "engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person." [Ariz. Rev. Stat. Ann.] § 13–3211(5) (1989) (emphasis added). "Sexual conduct" is defined as "sexual contact, sexual intercourse, oral sexual contact or sadomasochistic abuse." [Ariz. Rev. Stat. Ann.] § 13–3211(8) (1989). "Sexual contact" is defined as "any direct or indirect fondling or manipulating of any part of the genitals,

that sex for money is sex for money—would keep the California courts, like the *Freeman* court, from circumventing the intent of the legislature and having to apply the rule of lenity due to unclear statutory definitions and legislative intent.²⁵⁰ This clarification would eliminate the ambiguities glossed over by *Freeman* regarding the identity of the customer when a third party pays.²⁵¹

Second, the legislature should get rid of the mens rea or purpose requirement for pandering.²⁵² Currently, under *Freeman*, pandering requires prostitution, prostitution requires a lewd act, and a lewd act requires that “the money or other consideration must be paid *for the purpose of sexual arousal or gratification*.”²⁵³ This leaves courts to inquire into the subjective motives of why each person paid for a sex act and if that act sexually aroused or gratified the person.²⁵⁴ The subjective motive of the person paying the money or the ultimate sexual pleasure received by a person engaging in the sexual act should not change the court’s analysis for guilt. The act of exchanging money or consideration for a sexual act should be the basis of determining whether pandering occurred—not the motive behind or the pleasure a person receives from the act.²⁵⁵ The act alone should be enough: money or consideration paid for a sexual act.²⁵⁶

An objective standard is more just and fair because both citizens and

anus or female breasts.” [Ariz. Rev. Stat. Ann.] § 13–3211(9) (1989).

Taylor, 808 P.2d at 316. In contrast, California’s pandering statute does not adequately define prostitution, leaving room for the courts to step in and provide their own definition. *See, e.g.*, *Wooten v. Super. Ct.*, 113 Cal. Rptr. 2d 195 (Ct. App. 2001). California case law requires that prostitution be a lewd act, which courts have construed to require sexual gratification or arousal. *See Freeman*, 758 P.2d at 1130.

250. Despite the original language of the pandering statute saying “any person,” California’s case law has become convoluted and there is a question as to whether the sexual contact must be with the buyer to count as prostitution. *See* PENAL § 266i; discussion *supra* note 170.

251. *See* discussion *supra* note 170.

252. *See supra* text accompanying notes 172–74. Alternatively, the legislature could adopt the pandering definition from *Hill*, which states that prostitution is sexual intercourse *or* any lewd act, where the lewd act requires the subjective purpose element. *See* discussion *supra* note 169. While this option would have a similar effect, the subjective requirement is unnecessary and cumbersome.

253. *Freeman*, 758 P.2d at 1131; *see supra* notes 161–71 and accompanying text.

254. *See Freeman*, 758 P.2d at 1131 (concluding that there was no evidence that Freeman paid “acting fees” for his own sexual arousal or gratification, or that of the actors).

255. *See supra* note 249 for an example of Arizona’s pandering statute, which has an objective standard.

256. For example, California’s statutory rape statute does not have a mens rea requirement. *See supra* notes 149–50 and accompanying text.

courts will know what conduct is permissible and what conduct is prohibited.²⁵⁷ Courts will not be left to guess what the legislative intent is or—in the absence of clarity—create their own definitions, like the *Freeman* court did.²⁵⁸ Creating a bright-line definition of pandering will effectively overturn *Freeman* and avoid future blurred-line decisions.²⁵⁹

The pornography industry will undoubtedly argue that these changes are overbroad and violate their First Amendment “right to express [them]selves as [they] please.”²⁶⁰ However, other states with similar pandering statutes have upheld those statutes as constitutional and not a violation of the First Amendment.²⁶¹ There is no reason California should be any different. As *Freeman* explains, the First Amendment cannot protect someone from punishment for other criminal acts.²⁶²

VI. CONCLUSION

Sex trafficking is a complex, worldwide problem. There is no easy solution to eradicating this modern-day slavery and adequately protecting those enslaved. However, steps can be taken to help curb the selfish demand of buyers and extinguish what fuels demand. Specifically, California can erase the blurred lines in its laws by criminalizing buyers of sex trafficking victims and by clarifying that sex for money is illegal, irrespective of filming. Demanding justice and drawing a bright line under California law brings the world one step closer to abolishing the atrocity that is sex trafficking.

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257. *Cf. Wooten v. Super. Ct.*, 113 Cal. Rptr. 2d 195, 200–03 (Ct. App. 2001) (applying the rule of lenity because “under the current status of the law in California, the definition of prostitution is susceptible to different interpretations”).

258. *See Freeman*, 758 P.2d at 1130–31.

259. *See* discussion *supra* note 212.

260. *Vives*, *supra* note 213.

261. *See, e.g., State v. Freitag*, 130 P.3d 544 (Ariz. Ct. App. 2006) (holding that a prostitution ordinance did not violate a fundamental constitutional right); *People v. Kovner*, 409 N.Y.S.2d 349, 352 (Sup. Ct. 1978) (“While First Amendment considerations may protect the dissemination of printed or photographic material regardless of the manner in which it was obtained, this protection will not shield one against a prosecution for a crime committed during the origination of the act.”).

262. *See Freeman*, 758 P.2d at 1133–34.

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